TEXAS REGISTER

Volume 33 Number 7 *February 15, 2008* *Pages 1191 - 1464*

Cristina Garcia

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

Texas Register, **(ISSN 0362-4781, USPS 120-090),** is published weekly (52 times per year) for $211.00 ($311.00 for first class mail delivery) by LexisNexis Matthew Bender & Co., Inc., 1275 Broadway, Albany, N.Y. 12204-2694.

The ***Texas Register*** is published under the Government Code, Title 10, Chapter 2002. Periodicals Postage Paid at Albany, N.Y. and at additional mailing offices.

POSTMASTER: Send address changes to the ***Texas Register,*** 136 Carlin Rd., Conklin, N.Y. 13748-1531.

a section of the
Office of the Secretary of State
P.O. Box 13824
Austin, TX 78711-3824
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IN THIS ISSUE

WITHDRAWN RULES

ADOPTED RULES

Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 463-5561 in Austin. For out-of-town callers our toll-free number is 800-226-7199. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/opinopen/opengovt.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments

Appointment for January 29, 2008

Appointed to the Brazos River Authority Board of Directors, effective February 1, 2008, for a term to expire February 1, 2013, Peter Bennis of Cleburne (replacing John R. Skaggs of Amarillo whose term expired).

Appointments for January 30, 2008

Designating Esperanza (Hope) Andrade as Presiding Officer of the Texas Transportation Commission for a term at the pleasure of the Governor. Ms. Andrade is replacing Ric Williamson as presiding officer.

Appointed to the Texas Agricultural Finance Authority Board of Directors for a term to expire January 1, 2009, Stanley Ray of Georgetown (replacing Ruben Bosquez of McAllen who resigned).

Appointed to the Health Disparities Task Force for a term to expire February 1, 2010, Eva Moya of El Paso (replacing Lydia Hernandez of Austin whose term expired).

Appointed to the Health Disparities Task Force for a term to expire February 1, 2010, Elizabeth Noser of Sugar Land (replacing Richard Bartlett of Crane whose term expired).

Appointed to the Health Disparities Task Force for a term to expire February 1, 2009, Darrell Sims of Wichita Falls (replacing Martha Hargraves of Galveston whose term expired). Mr. Sims is replacing Martha Hargraves of Galveston as Presiding Officer of the board.

Rick Perry, Governor

TRD-200800724

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TEXAS ETHICS COMMISSION

The Texas Ethics Commission is authorized by the Government Code, §571.091, to issue advisory opinions in regard to the following statutes: the Government Code, Chapter 302; the Government Code, Chapter 305; the Government Code, Chapter 572; the Election Code, Title 15; the Penal Code, Chapter 36; and the Penal Code, Chapter 39. Requests for copies of the full text of opinions or questions on particular submissions should be addressed to the Office of the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, (512) 463-5800.

Notice of Correction - Advisory Opinion Request 542 (AOR 542)

Note: The notice published in the February 8, 2008, issue of the Texas Register (33 TexReg 1025) was not the complete summary and should be replaced with this summary.

AOR 542. A Texas general-purpose political committee that supports candidates from major political parties and that is interested in supporting candidates for state representative that share the same or similar philosophy as the committee's contributors has asked the Texas Ethics Commission to consider the following questions:

In light of Chapter 302 of the Government Code, may representatives of the political committee ask a candidate for state representative the following questions?

1. Will the candidate support or oppose any particular candidate for speaker of the House of Representatives (hereinafter "speaker candidate")?

2. Has the candidate signed a pledge card to support any particular speaker candidate?

3. Will the candidate likely vote for a speaker candidate who has a particular political philosophy or voting record?

The requestor also asks the following questions:

1. May the committee's decision to support or not support a candidate for state representative be based solely on whether that candidate will support or oppose any particular speaker candidate?

2. May a committee's decision to support or not support a candidate for state representative be based solely on whether that candidate has or has not signed a pledge card to support any particular speaker candidate?

3. May a committee representative ask whether a candidate for state representative is intending to, or has agreed to support any speaker candidate? May the committee consider the response as one factor to this question, together with numerous other factors (such as demographics, policy position of all the candidates, funding sources, campaign staff, other candidates in the race, funding availability, and sources for other candidates, the work ethic of the candidate, the candidates campaign staff, voting history of the district, etc.) in determining whether to support the candidate?

The Texas Ethics Commission is authorized by §571.091 of the Government Code to issue advisory opinions in regard to the following statutes: (1) Chapter 572, Government Code; (2) Chapter 302, Government Code; (3) Chapter 303, Government Code; (4) Chapter 305, Government Code; (5) Chapter 2004, Government Code; (6) Title 15, Election Code; (7) Chapter 159, Local Government Code; (8) Chapter 36, Penal Code; and (9) Chapter 39, Penal Code.

Questions on particular submissions should be addressed to the Texas Ethics Commission, P.O. Box 12070, Capitol Station, Austin, Texas 78711-2070, (512) 463-5800.

TRD-200800655
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Filed: February 1, 2008

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER D. REIMBURSEMENT METHODOLOGY FOR INTERMEDIATE CARE FACILITIES FOR PERSONS WITH MENTAL RETARDATION (ICF/MR)

The Texas Health and Human Services Commission (HHSC) proposes the repeal of §355.454, Frequency of Reporting Costs, and proposes to amend §355.457, Fiscal Accountability.

Background and Justification

Section 355.454 concerning Frequency of Reporting Costs outlined the requirements for reporting direct service costs for the ICF/MR program and the HCS waiver program; however, HHSC proposes its repeal as this rule has been superseded by other rules.

Section 355.457 establishes the fiscal accountability process for the Intermediate Care Facilities for Persons with Mental Retardation (ICF/MR) program. HHSC, under its authority and responsibility to administer and implement rates, proposes to update this rule to clarify and formalize certain requirements relating to required documentation and allowable costs, add procedures for determining recoupments when a provider fails to submit a cost report, and formalize procedures for allowing providers with control of multiple component codes in the program to request to aggregate their reports for purposes of determining compliance with spending requirements.

In addition, the proposed amendment updates administrative procedures relating to notification of recoupment amounts and recoupment of those amounts; removes outdated language; and adds definitions or updates references to other rules due to changes in those rules. The proposed amendment revises allowable cost limitations and the point in the recoupment determination process at which HHSC will notify providers of their recoupment amount. HHSC also proposes to delete obsolete language regarding: 1) a transitional add-on, 2) references to a subsection that no longer exists, and 3) descriptions of ICF/MR fiscal accountability processes prior to January 1, 1999.

Cost reports are necessary to determine whether providers met their fiscal accountability requirements and if they did not meet their requirements, to determine the amount of funds to be recouped by HHSC or its designee. Currently, the only enforcement tool available to HHSC when a provider fails to submit a cost report is to place the provider's vendor payments on hold until the report is submitted. While vendor hold is an effective enforcement tool in cases where a provider's contract is active, it is not effective in cases where the provider's contract has been terminated. The amended rule creates an incentive for providers whose contracts have been terminated to submit required reports by establishing a process to determine dollars to be recouped from such providers if they do not submit the required reports. The amended rule will make the fiscal accountability system more equitable by ensuring that terminated contracts are subject to fiscal accountability requirements along with ongoing contracts.

Currently, controlling entities are permitted to request evaluation of spending requirements for all of their controlled entities within the ICF/MR program in the aggregate, but there are no rules defining an entity or control for this purpose. This lack of rules leads to difficulties and confusion in the administration of the aggregation process. The proposed amendment formalizes current administrative procedures, which should result in an increased understanding of the aggregation process and of provider requirements. The proposed amendment should also reduce areas of disagreement between providers and HHSC as to how the aggregation process is applied.

Additional changes are proposed to update the rule to clarify and formalize current administrative practices, to delete other outdated language and to ensure that documentation requirements, spending requirements notification requirements, and recoupment collection processes are clearly outlined in rule.

Section-by-Section Summary

HHSC proposes to repeal §355.454.

HHSC proposes to make the following amendments to §355.457:

Revise subsection (b)(1) to reference the definition of Qualified Mental Retardation Professional contained in the Code of Federal Regulations.

Remove from subsection (b)(1) obsolete language relating to direct service supervision information.

Clarify and formalize in subsection (b)(1) that direct service costs include costs related to wages rather than costs related to wage rates.

Revise subsection (b)(2)(B) to replace reporting and documentation requirements for staff whose duties include work other than the provision of direct services with a reference to 1 TAC §355.105 relating to General Reporting and Documentation Requirements, Methods and Procedures.

Remove from subsection (b)(2)(C) an obsolete reference to subsection (a)(2) and reference to the term "operator".

Revise subsection (b)(2)(C) to apply to owner and related-party employees who provide multiple types of direct service and/or both direct hands-on support and first-level supervision of direct care workers in addition to owner and related-party employees who provide both direct and indirect services.

Modify subsection (b)(2)(C) to indicate the following. First, owner and related-party hours, hourly wage rates and benefits for direct service work are limited to the lesser of actual hours worked, hourly wage rate paid and benefits or the hours, hourly wage rate and benefits for a comparable direct care staff person assumed in the fully-funded model. Second, if at least 40 percent of total labor hours in the related-party's direct service type were provided by non-related-parties, the related-party's hourly wage rate is limited to the higher of the model assumption for that direct service type or the non-related party average for that direct service type. Third, at no time will the allowable related-party hourly wage exceed the related-party's actual hourly wage.

Modify subsection (b)(2)(C) to indicate that during any single fiscal year, the sum of all direct care hours reported on ICF/MR cost report(s) for any individual owner or related-party cannot exceed 2,600.

Add a new subsection (b)(2)(C)(v) which indicates that owner and related-party hours, hourly wage rates and benefits above the limits described in the subparagraph are to be reported as administrative hours, hourly wages and benefits.

Delete subsection (b)(3) which refers to obsolete language in §355.456 pertaining to annual inflation and re-designate subsection (b)(4) as subsection (b)(3).

Modify re-designated subsection (b)(3) to add contract termination as a trigger for vendor hold and to change "fiscal accountability report" to "cost report" since there is no stand-alone fiscal accountability report for this program.

Add new subsection (b)(4) which mandates the recoupment of funds related to fiscal accountability if a provider fails to submit an acceptable cost report within 60 days of a change of ownership or contract termination and that the recoupment become permanent if no cost report is received within 365 days of the date of the change of ownership or contract termination.

Add new subsection (b)(5) which mandates the recoupment of funds related to fiscal accountability if a provider fails to submit an acceptable cost report within 60 days of the placement of a vendor hold due to the failure to submit a cost report and that the recoupment become permanent if no cost report is received within 365 days of the report due date and renumber the subsequent paragraphs.

Add new subsection (b)(8) indicating that Informal Reviews and Formal Appeals of HHSC's exclusions and adjustments are governed by §355.110.

Delete subsection (c)(1) and (2) which describe ICF/MR fiscal accountability processes prior to January 1, 1999 and re-designate subsequent paragraphs.

Revise re-designated subsection (c)(1)(B) to replace "DADS" with "HHSC or its designee".

Revise re-designated subsection (c)(1)(C) to replace "DADS" with "HHSC or its designee" and to apply the recoupment described in that subparagraph to providers whose direct service costs are less than 90 percent but greater than or equal to 85 percent of direct service revenues. The current language applies this recoupment to providers whose direct service costs are between 85 percent and 90 percent of direct service revenues.

Add new subsection (c)(1)(D) which states that providers who fail to submit acceptable cost reports within the timeframes detailed in (b)(4) and (5) will be required to pay to DADS the difference between 65 percent of direct services revenues and 95 percent of direct services revenues.

Delete subsection (c)(4) which describes an outdated notification and recoupment process and replace it with new subsection (c)(2) which indicates that providers will be notified of any amount to be repaid to HHSC or its designee within 90 days of the determination of their recoupment amount by HHSC, that if a subsequent review by HHSC or audit results in adjustments to the cost report that change the amount to be repaid, the provider will be notified of the adjustments and the adjusted amount to be repaid, and that owed amounts will be automatically recouped from a provider's vendor payment following the date of the notification letter.

Modify re-designated subsection (c)(4) to describe in detail how recoupments will be collected from terminated contracts, including implications for other contracts controlled by the same responsible entity if funds identified for recoupment are not repaid in a timely fashion.

Add new subsection (c)(5) which formalizes requirements for compliance with spending requirements to be calculated in the aggregate for entities which control more than one ICF/MR component code.

Delete subsection (c)(7) which becomes extraneous with the adoption of new (b)(8).

Delete subsection (d) which refers to an obsolete transitional add-on.

Fiscal Note

Gordon E. Taylor, Chief Financial Officer for the Department of Aging and Disability Services, has determined that during the first five-year period the proposal is in effect there will be no fiscal impact to state government. The proposal will not result in any fiscal implications for local health and human services agencies. There are no fiscal implications for local governments as a result of enforcing or administering the sections.

Small Business and Micro-business Impact Analysis

HHSC has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the proposal. The implementation of the proposed rule amendment does not require any changes in practice or any additional cost to the contracted provider.

HHSC does not anticipate that there will be any economic cost to persons who are required to comply with this proposal. The proposal will not affect local employment.

Public Benefit

Carolyn Pratt, Director of Rate Analysis, has determined that for each of the first five years the amendment is in effect, the expected public benefit is that obsolete rule language will be eliminated and that the rule will provide clear guidance to agency staff and providers on documentation requirements; the recoupment determination, notification and payment collection processes; determining recoupments when a provider fails to submit a cost report; and requirements for compliance with

spending requirements to be calculated in the aggregate for entities which control more than one ICF/MR component code.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Public Comment

Questions about the content of this proposal may be directed to Pam McDonald in the HHSC Rate Analysis Department by telephone at (512) 491-1373. Written comments on the proposal may be submitted to Ms. McDonald by facsimile at (512) 491-1998, by e-mail to pam.mcdonald@hhsc.state.tx.us, or by mail to HHSC Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200, within 30 days of publication of this proposal in the *Texas Register.*

1 TAC §355.454

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Health and Human Services Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

Statutory Authority

The repeal is proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The repeal affects Texas Government Code Chapter 531 and Texas Human Resources Code Chapter 32. No other statutes, articles, or codes are affected by this proposal.

§355.454. Frequency of Reporting Costs.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 4, 2008.

TRD-200800663

Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 424-6900

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1 TAC §355.457

The amendment is proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The amendment affects Texas Government Code Chapter 531 and Texas Human Resources Code Chapter 32. No other statutes, articles, or codes are affected by this proposal.

§355.457. Fiscal Accountability.

(a) General principles. The Texas Health and Human Services Commission (HHSC) applies the general principles of cost determination as specified in §355.101 of this title (relating to Introduction). Fiscal accountability is a process used to gauge the ongoing financial performance under the non-state operated facility reimbursement rates.

(b) Annual reporting. Fiscal accountability will consist of the annual reporting of direct service costs from all non-state operated providers. The data will be collected on a cost report designed by HHSC in accordance with §355.105(b) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(1) Direct service costs include costs associated with personnel who provide direct hands-on support for consumers and include personnel such as direct care workers, first-level supervisors of direct care staff, Qualified Mental Retardation Professional (QMRPs), as defined in 42 Code of Federal Regulations, Part 483, Subpart I, §483.430 [~~QMRPs~~], registered nurses, and licensed vocational nurses. Direct service costs include: costs related to wages [~~wage rates~~], benefits, payroll taxes, and contracts for direct services [~~, and direct service supervision information~~]. Accrued leave (sick or annual) can only be considered a direct service cost if the employee has a right to the cash value of that leave upon termination.

(2) The provider is responsible for submission of the fiscal accountability cost report to HHSC, and payment of amounts owed in accordance with subsection (c) of this section, regardless of whether the provider contracts with another entity for the management or operation of the ICF/MR.

(A) If the provider contracts with another entity for the management or operation of the ICF/MR, the provider must report the specific direct services costs of that entity as required in the cost report instructions and not the amount for which the provider is contracting for the entity's services.

(B) For staff whose duties include work other than the provision of direct services for the provider, time spent providing [~~, the proportion of work that is spent on~~] direct services and associated expenses may be reported as [~~included in the~~] direct service costs if properly documented in accordance with §355.105 of this title (relat-

ing to General Reporting and Documentation Requirements, Methods, and Procedures). [~~The proportion of their salary and benefits that is compensation for direct services work can be included in the direct service cost report. The facility must have a procedure that specifies how direct service work time is allocated.~~]

(C) Allowable compensation for owners and related parties and definitions of owners and related parties are specified in §355.102(i) and §355.103(b)(2) of this title (relating to General Principles of Allowable and Unallowable Costs and Specifications for Allowable and Unallowable Costs).

(i) Owners and related-parties who provide multiple types of direct service, both direct care and indirect services and/or both direct hands-on support and first-level supervision of direct care workers must maintain daily time sheets that record the time spent on activities in each area. The provider must maintain documentation relating to the compensation, bonuses, and benefits of each owner or related party in accordance with §355.105(b)(2)(B)(xi) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(ii) Allowable hours, hourly wage rate and benefits for direct service work must be the lesser of the actual hours worked, hourly wage rate paid and benefits paid or the hours, hourly wage rate and benefits for a comparable direct care staff person assumed in the fully-funded model. The fully-funded model is the model as calculated under §355.456(d) of this title (relating to Reimbursement Methodology) prior to any adjustments made in accordance with §355.101 of this title (relating to Introduction) and §355.109 of this title (relating to Adjusting Reimbursement When New Legislation, Regulations or Economic Factors Affect Costs) for the rate period.

(iii) If at least 40 percent of total labor hours in a specific related-party's direct service type were provided by non-related-parties, the related-party's hourly wage rate may be the higher of the model assumption for that direct service type described in clause (ii) of this subparagraph or the non-related party average for that direct service type, so long as the non-related party average does not exceed the related-party's actual hourly wage.

(iv) During any single fiscal year, the sum of all direct care hours reported on ICF/MR cost report(s) for any individual owner or related party cannot exceed 2,600.

(v) Hours, hourly wages and benefits above the limits described in clauses (ii) - (iv) of this subparagraph are to be reported as administrative hours, hourly wages and benefits.

[~~(C) If the staff providing direct services is an owner, operator, or a related party as defined in §§355.102(i) - 355.103(b)(2) of this title (relating to General Principles of Allowable and Unallowable Costs and Specifications for Allowable and Unallowable Costs), the salary and benefits must be the lesser of the actual wages and benefits paid or the wages and benefits for a comparable staff person assumed in the model. Owner and related party employees who provide both direct care and indirect services must maintain daily time sheets that record the time spent on activities in each area. The provider must maintain documentation relating to compensation, bonuses, and benefits of each owner or related party in accordance with §355.105(b)(2)(B)(xi) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures). The maximum hours per fiscal year that an owner and related party employee may report on the cost report is 2080 hours per fiscal year.~~]

[~~(3) The direct service portions of the current rate model are inflated on an annual basis as specified in §355.456(d)(2) of this title (relating to Rate Setting Methodology).~~]

(3) [~~(4)~~] The Department of Aging and Disability Services (DADS) will place a vendor hold on a prior owner at a change of ownership which results in the execution of a new provider agreement or a contract termination. The prior owner must submit a cost [~~fiscal accountability~~] report to HHSC for the current reporting period. Upon receipt of an acceptable cost [~~fiscal accountability~~] report and resolution of any outstanding balances, the vendor hold will be released.

(4) Providers with an ownership change from one legal entity to a different legal entity or a contract termination that do not submit a cost report for the fiscal year of the ownership change or contract termination within 60 days of the change of ownership or contract termination are subject to recoupment of funds related to fiscal accountability as described in subsection (c)(1)(D) of this section. The recouped funds will not be restored until the provider submits an acceptable cost report and has paid the actual amount due as specified in subsection (c)(1)(A) - (C) of this section. If an acceptable cost report is not received within 365 days of the change of ownership or contract termination date, the recoupment will become permanent.

(5) Providers that do not submit a cost report completed in accordance with all applicable rules and instructions within 60 days of the placement of a vendor hold due to the failure to submit the cost report are subject to an immediate recoupment of funds related to fiscal accountability as described in subsection (c)(1)(D) of this section. The recouped funds will not be restored until the provider submits an acceptable cost report and has paid the actual amount due as specified in subsection (c)(1)(A) - (C) of this section. If an acceptable cost report is not received within 365 days of the due date, the recoupment will become permanent.

(6) [~~(5)~~] For cost reports pertaining to providers' fiscal years ending in calendar year 2004 and subsequent years the following applies:

(A) Providers must follow the cost-reporting guidelines as specified in §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(B) Providers must follow the guidelines in determining whether a cost is allowable or unallowable as specified in §355.102 and §355.103 of this title (relating to General Principles of Allowable and Unallowable Costs, and Specifications for Allowable and Unallowable Costs).

(C) Revenues must be reported on the cost report in accordance with §355.104 of this title (relating to Revenues).

(7) [~~(6)~~] Field Audit and Desk Review. Desk reviews or field audits are performed on cost reports for all contracted providers. The frequency and nature of the field audits are determined by HHSC to ensure the fiscal integrity of the program. Desk reviews and field audits will be conducted in accordance with §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports), and providers will be notified of the results of a desk review or a field audit in accordance with §355.107 of this title (relating to Notification of Exclusions and Adjustments).

(8) Reviews of exclusions or adjustments. An ICF/MR provider who disagrees with HHSC's exclusion or adjustment of items in cost reports may request an informal review and, when appropriate, an administrative hearing as specified in §355.110 of this title (relating to Informal Reviews and Formal Appeals).

(c) HHSC will require providers to report all direct costs incurred in their annual fiscal year. HHSC will compare the reported direct service costs to the direct service cost component of the modeled rates.

[(1) Paragraph (2) of this subsection, concerning the fiscal accountability repayment, applies to that portion of the provider's fiscal year that occurs after April 5, 1998. Paragraph (3) of this subsection, concerning the fiscal accountability repayment, applies to that portion of the provider's fiscal year that begins on or after January 1, 1999.]

[(2) The total direct service revenue of the modeled rates is the direct service portion of the rate multiplied by the number of allowable units paid for services provided during the reporting period.]

[(A) Providers whose direct service costs are 90% or more of the direct service revenues will not be subject to repayment under this section.]

[(B) Providers whose direct service costs are less than 80% of the direct service revenues will be required to pay to DADS the difference between the direct service costs and 95% of the direct service revenues.]

[(C) Providers whose direct service costs are between 80% and 85% of the direct service revenues will be required to pay to DADS 100% of the difference between the direct service costs and 85% of the direct service revenues plus 50% of the difference between 85% and 90% of the direct service revenues.]

[(D) Providers whose direct service costs are between 85% and 90% of the direct service revenues will be required to pay to DADS 50% of the difference between the direct service costs and 90% of the direct service revenues.]

(1) [(3)] The total direct service revenue of the modeled rates is the direct service portion of the rate multiplied by the number of allowable units paid for services provided during the reporting period.

(A) Providers whose direct service costs are 90% or more of the direct service revenues will not be subject to repayment under this section.

(B) Providers whose direct service costs are less than 85% of the direct service revenues will be required to pay to HHSC or its designee [DADS] the difference between the direct service costs and 95% of the direct service revenues.

(C) Providers whose direct service costs are less than 90% but greater than or equal to 85% [between 85% and 90%] of the direct service revenues will be required to pay to HHSC or its designee [DADS] 75% of the difference between the direct service costs and 90% of the direct service revenues.

(D) Providers who do not submit an acceptable cost report as described in subsection (b)(4) or (5) of this section will be assumed to have direct service costs equal to 65% of the direct services revenues and HHSC or its designee will recoup the difference between 65% of the direct services revenues and 95% of the direct service revenues, subject to the provisions of subsection (b)(4) or (5) of this section.

[(4) The fiscal accountability calculation shows an estimated amount due for repayment. A provider's repayment status may change as a result of the desk review or onsite audit of the cost report or adjustments to claims paid to the provider for services provided in the cost reporting period. The provider will be notified of the results of the desk reviews or onsite audits in accordance with §355.107 of this title (relating to Notification of Exclusions and Adjustments). If the adjustments and or exclusions result in an amount due, or if the original estimated amount due calculation is upheld, HHSC will notify the provider of the amount due and the provider will remit the repayment amount no later than 60 calendar days after the date of the notification was received by the provider.]

(2) Providers will be notified, by certified mail, within 90 days of the determination of their recoupment amount by HHSC of the amount to be repaid to HHSC or its designee. If a subsequent review by HHSC or audit results in adjustments to the Cost Report as described in subsection (b)(7) of this section that changes the amount to be repaid to HHSC or its designee, the provider will be notified in writing of the adjustments and the adjusted amount to be repaid. HHSC or its designee will recoup any amount owed from a provider's vendor payment(s) following the date of the notification letter.

(3) [(5)] Repayment will be collected from the following:

(A) the provider or legal entity submitting the report;

(B) any other legal entity responsible for the debts or liabilities of the submitting entity; or

(C) the legal entity on behalf of which a report is submitted.

[(6) Providers will be jointly and severally liable for any repayment due. Failure to repay the amount due by the 61st calendar day after the provider has received notification may result in a vendor hold on all of the ICF/MR payments to a provider.]

(4) For providers undergoing an ownership change or contract termination, HHSC or its designee will recoup any amount owed from the provider's vendor payments that are being held. In cases where funds identified for recoupment cannot be repaid from the held vendor payments, the responsible entity from paragraph (3) of this subsection will be jointly and severally liable for any additional payment due to HHSC or its designee. Failure to repay the amount due or submit an acceptable payment plan within 60 days of notification will result in the recoupment of the owed funds from other Medicaid contracts controlled by the responsible entity, placement of a vendor hold on all Medicaid contracts controlled by the responsible entity and will bar the responsible entity from receiving any new contracts with HHSC or its designee until repayment is made in full. The responsible entity for these contracts will be notified as described in paragraph (2) of this subsection prior to the recoupment of owed funds, placement of vendor hold and barring of new contracts.

(5) Aggregation.

(A) Definitions. The following words and terms have the following meanings when used in this paragraph.

(i) Aggregation. For entities that control more than one ICF/MR component code, the process of determining compliance with the spending requirements detailed in paragraph (1) of this subsection for all component codes controlled by the entity in the aggregate rather than requiring each component code to meet its spending requirement individually.

(ii) Entity--a parent company, sole member, individual, limited partnership, or group of limited partnerships controlled by the same general partner.

(iii) Control--greater than 50 % ownership by the entity.

(B) Component Codes Included in Aggregation. If an entity controlling more than one ICF/MR component code requests aggregation, compliance with the spending requirements will be evaluated in the aggregate for all ICF/MR component codes that the entity controlled at the end of its fiscal year or at the effective date of the change of ownership or termination of its last ICF/MR contract.

(C) Aggregation Request. To exercise the aggregation option, the entity must submit an aggregation request, in a manner prescribed by HHSC, at the time each cost report is submitted. In limited

partnerships in which the same single general partner controls all the limited partnerships, that single general partner must make this request. Other such aggregation requests will be reviewed on a case-by-case basis.

(D) Frequency of Aggregation Requests. The entity must submit a separate request for aggregation for each reporting period.

(E) Ownership Changes and Contract Terminations. ICF/MR contracts that change ownership or terminate effective after the end of the applicable reporting period, but prior to the determination of compliance with spending requirements in paragraph (1) of this subsection, are excluded from all aggregate spending calculations. These contracts' compliance with spending requirements will be determined on an individual basis and the costs and revenues will not be included in the aggregate spending calculation.

(F) Failure to Disclose All ICF/MR Component Codes. Failure to disclose all ICF/MR component codes controlled by the entity making the request as permitted in this paragraph will result in the denial of, or revocation of a prior approval of, the request to aggregate for all component codes so controlled.

~~[(7) Providers may request an informal review and, if necessary, an administrative hearing to dispute an action taken under §355.110 of this title (relating to Informal Reviews and Formal Appeals).]~~

~~[(d) If a provider is paid a transitional add-on for a consumer in accordance with §355.456(e) of this title, the provider may exclude the amount of the transitional add-on from its fiscal accountability cost report only if the consumer resides in the small non-state operated facility for at least 12 months.]~~

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 4, 2008.

TRD-200800664
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 424-6900

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SUBCHAPTER F. REIMBURSEMENT METHODOLOGY FOR PROGRAMS SERVING PERSONS WITH MENTAL ILLNESS AND MENTAL RETARDATION

1 TAC §355.722

The Texas Health and Human Services Commission (HHSC) proposes an amendment to §355.722, relating to Reporting Costs for the Home and Community-based Services (HCS) program.

Background and Justification

This rule establishes the cost reporting and fiscal accountability process for the Home and Community-based Services (HCS) waiver program and outlines the requirements of reporting direct service costs for the HCS waiver program. HHSC, under its authority and responsibility to administer and implement rates, is updating this rule by clarifying and formalizing certain requirements related to documentation and allowable costs, adding procedures for determining recoupments when a provider fails to submit a cost report, and formalizing procedures for allowing providers with control of multiple component codes in the program to request to aggregate their reports for purposes of determining compliance with spending requirements.

In addition, the proposed amendment updates administrative procedures relating to notification of recoupment amounts; removes outdated language; and adds definitions or updates references to other rules due to changes in those rules. The amendment revises allowable cost limitations and the point in the recoupment determination process at which HHSC will notify providers of their recoupment amount. HHSC also proposes to delete obsolete language regarding: 1) Mental Retardation Local Authority conversion, and 2) references to a subsection that no longer exists.

Cost reports are necessary to determine whether providers met their fiscal accountability requirements and, if they did not meet their requirements, to determine the amount of funds to be recouped by HHSC or its designee. Currently, the only enforcement tool available to HHSC when a provider fails to submit a cost report is to place the provider's vendor payments on hold until the report is submitted. While vendor hold is an effective enforcement tool in cases where a provider's contract is active, it is not effective in cases where the provider's contract has been terminated. The amended rule creates an incentive for providers whose contracts have been terminated to submit required reports by establishing a process to determine dollars to be recouped from such providers if they do not submit the required reports. The amended rule will make the fiscal accountability system more equitable by ensuring that terminated contracts are subject to fiscal accountability requirements along with ongoing contracts.

Currently, controlling entities are permitted to request evaluation of spending requirements for all of their controlled entities within the HCS program in the aggregate but there are no rules defining an entity or control for this purpose. This lack of rules leads to difficulties and confusion in the administration of the aggregation process. The proposed amendment formalizes current administrative procedures, which should result in increased understanding of the aggregation process and requirements by providers. The proposed amendment should reduce areas of disagreement between providers and HHSC as to how the aggregation process is applied.

Section-by-Section Summary

The proposed amendment revises §355.722 to:

Delete extraneous references to HCS throughout the section.

Remove from subsection (a)(1) obsolete language relating to direct service supervision information.

Clarify and formalize in subsection (a)(1) that direct service costs include costs related to wages rather then costs related to wage rates.

Revise subsection (a)(2) to replace reporting and documentation requirements for staff whose duties include work other than the provision of direct services with a reference to §355.105 relating to General Reporting and Documentation Requirements, Methods and Procedures.

Remove from subsection (h) an obsolete reference to subsection (a)(2).

Revise subsection (h) to apply to owners and related-party employees who provide multiple types of direct service and/or both direct hands-on support and first-level supervision of direct care workers in addition to owner and related party employees who provide both direct and indirect services.

Modify subsection (h) to indicate the following. First, owner and related-party hours, hourly wage rates and benefits for direct service work are limited to the lesser of actual hours worked, hourly wage rate paid and benefits or the hours, hourly wage rate and benefits for a comparable direct care staff person assumed in the fully-funded model. Second, if at least 40 percent of total labor hours in the related-party's direct service type were provided by non-related-parties, the related-party's hourly wage rate is limited to the higher of the model assumption for that direct service type or the non-related party average for that direct service type. Third, at no time will the allowable related-party hourly wage exceed the related-party's actual hourly wage.

Modify subsection (h) to indicate that during any single fiscal year, the sum of all direct care hours reported on HCS cost report(s) for any individual owner or related-party cannot exceed 2,600.

Add new subsection (h)(5) which indicates that owner and related-party hours, hourly wages and benefits above the limits described in the subsection are to be reported as administrative hours, hourly wages and benefits.

In subsection (j)(2)(A), replace the word "appropriate" with "acceptable" when describing what type of cost report must be submitted in order for vendor hold on a terminated provider agreement to be released and delete the description of which state entity amounts due must be repaid to prior to the release of the vendor hold.

Delete subsection (j)(2)(B) as an obsolete reference to the Mental Retardation Local Authority conversion.

Add new subsection (j)(2)(B) which mandates the recoupment of funds related to fiscal accountability if a provider fails to submit an acceptable cost report within 60 days of the placement of a vendor hold due to the failure to submit a cost report and that the recoupment become permanent if no cost report is received within 365 days of the report due date.

Add new subsection (j)(2)(C) which mandates the recoupment of funds related to fiscal accountability if a provider fails to submit an acceptable cost report within 60 days of a change of ownership or contract termination and that the recoupment become permanent if no cost report is received within 365 days of the date of the change of ownership or contract termination.

Revise subsection (j)(4)(B) to apply the recoupment described in that subparagraph to providers whose direct service costs are less then 90 percent but greater than or equal to 85 percent of direct service revenues. The current language applies this recoupment to providers whose direct service costs are between 85 percent and 90 percent of direct service revenues.

Revise subsection (j)(4)(C) to apply the recoupment described in that subparagraph to providers whose direct service costs are less then 85 percent but greater then or equal to 80 percent of direct service revenues. The current language applies this recoupment to providers whose direct service costs are between 80 percent and 85 percent of direct service revenues.

Add new subsection (j)(4)(E) which states that providers who fail to submit acceptable cost reports within the timeframes detailed in subsection (j)(2)(B) and (C) will be required to pay to DADS the difference between 65 percent of direct services revenues and 95 percent of direct services revenues.

Revise subsection (j)(5) to indicate that providers will be notified of any amount to be repaid to HHSC or its designee within 90 days of the determination of their recoupment amount by HHSC. Current language indicates that providers will be notified within 90 days of submitting their cost reports.

Revise subsection (j)(5) to indicate that if a subsequent review by HHSC or audit results in adjustments to the cost report that change the amount to be repaid, the provider will be notified of the adjustments and the adjusted amount to be repaid.

Add new subsection (j)(8) which formalizes requirements for compliance with spending requirements to be calculated in the aggregate for entities which control more than one HCS component code.

Fiscal Note

Gordon E. Taylor, Chief Financial Officer for the Department of Aging and Disability Services, has determined that during the first five-year period the amended rule is in effect there will be no fiscal impact to state government. The amended rule will not result in any fiscal implications for local health and human services agencies. There are no fiscal implications for local governments as a result of enforcing or administering the section.

Small Business and Micro-business Impact Analysis

HHSC has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the amendment. The implementation of the proposed rule amendment does not require any changes in practice or any additional cost to the contracted provider.

HHSC does not anticipate that there will be any economic cost to persons who are required to comply with this amendment. The amendment will not affect local employment.

Public Benefit

Carolyn Pratt, Director of Rate Analysis, has determined that, for each of the first five years the amendment is in effect, the expected public benefit is that obsolete rule language will be eliminated and that the rules will provide clear guidance to agency staff and providers on documentation requirements; the recoupment determination, notification and payment collection processes; determining recoupments when a provider fails to submit a cost report; and requirements for compliance with spending requirements to be calculated in the aggregate for entities which control more then one HCS component code.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may

adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Public Comment

Questions about the content of this proposal may be directed to Pam McDonald in the HHSC Rate Analysis Department by telephone at (512) 491-1373. Written comments on the proposal may be submitted to Ms. McDonald by facsimile at (512) 491-1998, by e-mail to pam.mcdonald@hhsc.state.tx.us, or by mail to HHSC Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200, within 30 days of publication of this proposal in the *Texas Register*.

Statutory Authority

The amendment is proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provides HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The amendment affects Texas Government Code Chapter 531and Texas Human Resources Code Chapter 32. No other statutes, articles, or codes are affected by this proposal.

§355.722. Reporting Costs by Home and Community-based Services (HCS) Providers.

(a) On an annual basis, all [~~HCS~~] providers must submit cost reports as directed by HHSC or its designee and in accordance with this subchapter. The Texas Health and Human Services Commission (HHSC) applies the general principles of cost determination as specified in §355.101 of this title (relating to Introduction).

(1) Direct service costs are defined to include costs associated with personnel who provide direct hands-on support for consumers and include personnel such as direct care workers, first-level supervisors of direct care workers, registered nurses, licensed vocational nurses, and other personnel who provide activities of daily living training and clinical program services. Direct service costs include: costs related to wages [~~wage rates~~], benefits, payroll taxes, and contracts for direct services [~~, and direct service supervision information~~]. Accrued leave (sick or vacation) can only be considered a direct service cost if the employee has a right to a cash value of that leave upon termination.

(2) For staff whose duties include work other than the provision of direct services for the provider, time spent providing [~~, the proportion of work that is spent on~~] direct services and associated expenses may be reported as [~~included in the~~] direct service costs if properly documented in accordance with §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures). [~~The proportion of their salary and benefits that are compensation for direct services work can be included in the direct service cost report only to the extent that the salary and benefits for this direct service work must be the lesser of the actual wages and benefits or the wages and benefits for a comparable direct care workers assumed in the model. The provider must have a procedure that specifies how direct service work time is allocated.~~]

(3) Providers must report the following costs:

(A) Staff wages related to the delivery of direct services including residential assistance, day habilitation services, and the direct supervision of the delivery of these services.

(B) These costs may be either the [~~HCS~~] provider's actual expense or contracted expenditures.

(b) Reviews of exclusions or adjustments. A [~~An HCS~~] provider who disagrees with HHSC's exclusion or adjustment of items in cost reports may request an informal review and, when appropriate, an administrative hearing as specified in §355.110 of this title (relating to Informal Reviews and Formal Appeals).

(c) Field audit and desk review. Desk reviews or field audits are performed on cost reports for all contracted providers. The frequency and nature of the field audits are determined by HHSC to ensure the fiscal integrity of the program. Desk reviews and field audits will be conducted in accordance with §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports).

(d) Notification of exclusions and adjustments. HHSC will notify a [~~an HCS~~] provider of the results of a desk review or field audit in accordance with §355.107 of this title (relating to Notification of Exclusions and Adjustments).

(e) Providers must follow the cost-reporting guidelines as specified in §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(f) Providers must follow the guidelines in determining whether a cost is allowable or unallowable as specified in §355.102 and §355.103 of this title (relating to General Principles of Allowable and Unallowable Costs, and Specifications for Allowable and Unallowable Costs).

(g) Revenues must be reported on the cost report in accordance with §355.104 of this title (relating to Revenues).

(h) Allowable compensation for owners and related parties and definitions of owners and related parties are specified in §355.102(i) and §355.103(b)(2) of this title (relating to General Principles of Allowable and Unallowable Costs and Specifications for Allowable and Unallowable Costs). [~~and subsection (a)(2) of this section. Owner and related party employees who provide both direct care and indirect services must maintain daily time sheets that record the time spent on activities in each area. The provider must maintain documentation relating to compensation, bonuses, and benefits of each owner or related party in accordance with §355.105(b)(2)(B)(xi) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures). The maximum hours per fiscal year that an owner and related party employee may report on the cost report is 2080 hours per fiscal year.~~]

(1) Owners and related parties who provide multiple types of direct service, both direct care and indirect services and/or both direct hands-on support and first-level supervision of direct care workers must maintain daily time sheets that record the time spent on activities in each area. The provider must maintain documentation relating to the compensation, bonuses, and benefits of each owner or related party in accordance with §355.105(b)(2)(B)(xi) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(2) Allowable hours, hourly wage rate and benefits for direct service work must be the lesser of the actual hours worked, hourly wage rate paid and benefits paid or the hours, hourly wage rate and benefits for a comparable direct care staff person assumed in the fully-funded model. The fully-funded model is the model as calculated under

§355.723(d) of this title (relating to Reimbursement Methodology for Home and Community-based Services) prior to any adjustments made in accordance with §355.101 of this title (relating to Introduction) and §355.109 of this title (relating to Adjusting Reimbursement When New Legislation, Regulations or Economic Factors Affect Costs) for the rate period.

(3) If at least 40 percent of total labor hours in a specific related-party's direct service type were provided by non-related-parties, the related-party's hourly wage rate may be the higher of the model assumption for that direct service type described in paragraph (2) of this subsection or the non-related party average for that direct service type, so long as the non-related party average does not exceed the related-party's actual hourly wage.

(4) During any single fiscal year, the sum of all direct care hours reported on HCS cost report(s) for any individual owner or related party cannot exceed 2,600.

(5) Hours, hourly wages and benefits above the limits described in paragraphs (2) - (4) of this subsection are to be reported as administrative hours, hourly wages and benefits.

(i) Each provider's total reported allowable costs, excluding depreciation and mortgage interest, are projected from the historical cost-reporting period to the prospective reimbursement period as described in §355.108 of this title (relating to Determination of Inflation Indices). HHSC may adjust reimbursement if new legislation, regulations, or economic factors affect costs, according to §355.109 of this title (relating to Adjusting Reimbursement When New Legislation, Regulations, or Economic Factors Affect Costs).

(j) Fiscal Accountability.

(1) General principles. Fiscal accountability is a process used to gauge the ongoing financial performance under the reimbursement rates.

(2) Annual reporting. Fiscal accountability will consist of the annual reporting of the direct service costs including wages, and benefits, from all [~~HCS~~] providers. The data will be collected on a cost report designed by HHSC in accordance with §355.105(b) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(A) The Department of Aging and Disability Services (DADS) will place a vendor hold on payments to a [~~an HCS~~] provider whose provider agreement is being assigned or terminated. The [~~HCS~~] provider will submit a cost report for the current reporting period to HHSC. Upon receipt of an acceptable [~~appropriate~~] cost report and repayment of any amounts due [~~to HHSC~~] in accordance with this section, the vendor hold will be released.

(B) Providers that do not submit a cost report completed in accordance with all applicable rules and instructions within 60 days of the placement of a vendor hold due to the failure to submit the cost report are subject to an immediate recoupment of funds related to fiscal accountability as described in paragraph (4)(E) of this subsection. The recouped funds will not be restored until the provider submits an acceptable cost report and has paid the actual amount due as specified in paragraphs (5) - (7) of this subsection. If an acceptable cost report is not received within 365 days of the due date, the recoupment will become permanent.

~~[(B) HCS providers are exempt from submitting cost reports in accordance with this section for the portion of their programs that convert to the Mental Retardation Local Authority (MRLA Program) for the fiscal year in which the conversion occurred.]~~

(C) Providers with an ownership change from one legal entity to a different legal entity or a contract termination that do not submit a cost report for the fiscal year of the ownership change or contract termination within 60 days of the change of ownership or contract termination are subject to recoupment of funds related to fiscal accountability as described in paragraph (4)(E) of this subsection. The recouped funds will not be restored until the provider submits an acceptable cost report and has paid the actual amount due as specified in paragraphs (5) - (7) of this subsection. If an acceptable cost report is not received within 365 days of the change of ownership or contract termination date, the recoupment will become permanent.

(3) HHSC will require [~~HCS~~] providers to report all direct costs incurred on an annual fiscal year basis. HHSC will compare the reported direct service costs to the total direct service revenue.

(4) Direct Service Revenues are calculated by multiplying the number of units eligible for payment that have been paid for services delivered during the reporting period times the appropriate direct service portion of the rate for the service billed.

(A) Providers [~~HCS providers~~] whose direct service costs are 90% or more of the direct service revenues will not be subject to repayment under this section.

(B) Providers [~~HCS providers~~] whose direct service costs are less than 90% but greater than or equal to 85% [~~between 85% and 90%~~] of the direct service revenues will be required to pay to DADS 50% of the difference between the direct service costs and 90% of the direct service revenues.

(C) Providers [~~HCS providers~~] whose direct service costs are less than 85% but greater than or equal to 80% [~~between 80% and 85%~~] of the direct service revenues will be required to pay to DADS 100% of the difference between the direct service costs and 85% of the direct service revenues plus 50% of the difference between 85% and 90% of the direct service revenues.

(D) Providers [~~HCS providers~~] whose direct service costs are less than 80% of the direct service revenues will be required to pay to DADS the difference between the direct service costs and 95% of the direct service revenues.

(E) Providers who do not submit a cost report as described in paragraph (2)(B) or (C) of this subsection will be assumed to have direct service costs equal to 65% of the direct services revenues and will be required to pay to DADS the difference between 65% of the direct services revenues and 95% of the direct service revenues, subject to the provisions of paragraph (2)(B) or (C) of this subsection.

(5) Where applicable, [~~HCS~~] providers will be notified , by certified mail, within 90 days of the determination of their recoupment amount by HHSC of the amount to be repaid to HHSC or its designee. If a subsequent review by HHSC or audit results in adjustments to the cost report as described in subsection (a) of this section that change the amount to be repaid to HHSC or its designee, the provider will be notified in writing of the adjustments and the adjusted amount to be repaid. Providers [~~of the requirement to repay revenues within 90 days of submitting their cost reports An HCS provider's repayment status may change as a result of the desk reviews or outside audits of cost reports, or adjustments to claims paid to the HCS provider for services provided in the cost reporting period. HCS providers~~] will submit the repayment amount within 60 days of notification.

(6) Repayment will be made by the following:

(A) the [~~HCS~~] provider or legal entity submitting the report;

(B) any other legal entity responsible for the debts or liabilities of the submitting entity; or

(C) the legal entity on behalf of which a report is submitted.

(7) Providers [~~HCS providers~~] required to repay revenues to DADS will be jointly and severally liable for any repayment. DADS will apply a vendor hold on Medicaid payments to a [~~HCS~~] provider for not making the payment to DADS within 60 days of receiving notice.

(8) Aggregation.

(A) Definitions. The following words and terms have the following meanings when used in this paragraph.

(i) Aggregation. For entities that control more than one HCS component code, the process of determining compliance with the spending requirements detailed in paragraph (4) of this subsection for all component codes controlled by the entity in the aggregate rather than requiring each component code to meet its spending requirement individually.

(ii) Entity--a parent company, sole member, individual, limited partnership, or group of limited partnerships controlled by the same general partner.

(iii) Control--greater than 50 % ownership by the entity.

(B) Component Codes Included in Aggregation. If an entity controlling more than one HCS component code requests aggregation, compliance with the spending requirements will be evaluated in the aggregate for all HCS component codes that the entity controlled at the end of its fiscal year or at the effective date of the change of ownership or termination of its last HCS contract.

(C) Aggregation Request. To exercise the aggregation option, the entity must submit an aggregation request, in a manner prescribed by HHSC, at the time each cost report is submitted. In limited partnerships in which the same single general partner controls all the limited partnerships, that single general partner must make this request. Other such aggregation requests will be reviewed on a case-by-case basis.

(D) Frequency of Aggregation Requests. The entity must submit a separate request for aggregation for each reporting period.

(E) Ownership Changes and Contract Terminations. HCS contracts that change ownership or terminate effective after the end of the applicable reporting period, but prior to the determination of compliance with spending requirements in paragraph (4) of this subsection, are excluded from all aggregate spending calculations. These contracts' compliance with spending requirements will be determined on an individual basis and the costs and revenues will not be included in the aggregate spending calculation.

(F) Failure to Disclose All HCS Component Codes. Failure to disclose all HCS component codes controlled by the entity making the request as permitted in this paragraph will result in the denial of, or revocation of a prior approval of, the request to aggregate for all component codes so controlled.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 4, 2008.

TRD-200800665
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 424-6900

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TITLE 13. CULTURAL RESOURCES

PART 8. TEXAS FILM COMMISSION

CHAPTER 122. TEMPORARY USE OF STATE BUILDINGS AND GROUNDS BY TELEVISION OR FILM PRODUCTION COMPANIES

13 TAC §§122.1 - 122.11

The Office of the Governor, Texas Film Commission (Commission) proposes new §§122.1 - 122.11, concerning the temporary use of state buildings and grounds by television or film production companies, as well as their use for free for 7 days each fiscal year.

The new rules are proposed because House Bill 374 of the 80th Legislature set forth the guidelines for using a state property for production activity, and the Texas Film Commission's oversight of such use.

Proposed §122.1 sets forth the background and purpose of the rules.

Proposed §122.2 sets forth the definitions of the rules.

Proposed §122.3 sets forth the eligibility requirements for an entity to apply for the use of state buildings or grounds for production activity, and an entity's eligibility to use the location for free.

Proposed §122.4 sets forth an entity's ineligibility to apply for the use of state buildings or grounds for production activity, and an entity's ineligibility to use the location for free.

Proposed §122.5 sets forth an entity's application process.

Proposed §122.6 sets forth the Commission's approval process.

Proposed §122.7 sets forth the entity's responsibilities.

Proposed §122.8 sets forth the procedures conducted by the Commission during an entity's production activity.

Proposed §122.9 sets forth the rules for allowing an entity to use a state property for free.

Proposed §122.10 sets forth the rights of the state property and the Commission.

Proposed §122.11 sets forth the reasons for an entity's disqualification from using a state property for production activity.

Bob Hudgins, Director of the Texas Film Commission, has determined that there will be no fiscal implications to the state or to local governments as a result of the proposed new rules. No cost to either government or the public will result from the proposed new rules. There will be no impact on small businesses or microbusinesses.

Mr. Bob Hudgins has also determined that the public benefit anticipated as a result of the new rules is a clearer understanding of who can use a state property for production activity, and how

they apply for the use. No economic costs are anticipated for persons who are required to comply with the proposed new rules.

Written comments on the proposed new rules may be hand delivered to Office of the Governor, General Counsel Division, 1100 San Jacinto, Austin, Texas 78701, mailed to P.O. Box 12428, Austin, Texas 78711-2428, or faxed to (512) 463-1932 and should be addressed to the attention of Michael Bryant, Assistant General Counsel. Comments must be received within 30 days of publication of the proposed new rules.

The new rules are proposed pursuant to the Texas Government Code §2165.008 which directs the Commission to develop a procedure for the temporary use of state building or grounds by a production company, and Government Code, Chapter 2001, Subchapter B which prescribes the standards for rulemaking by state agencies.

No other codes, statutes, or articles are affected by this proposal.

§122.1. Background and Purpose.

(a) Background. House Bill 374 establishes the rules and processes for the temporary use of state properties by a production company for production activity. It also establishes that a state property can be used seven days during a fiscal year without charge, other than the reimbursement of additional costs. This Act takes effect September 1, 2007.

(b) Purpose.

(1) Texas has had a prodigious film industry for decades, and has always been popular with filmmakers worldwide for its varied and beautiful locations. It has been the Texas Film Commission's (TFC) responsibility since 1971 to help filmmakers find the right location, and state properties have always been popular choices. Establishing rules and processes for filming at these locations will make it easier for filmmakers to use their preferred locations, as well as take the burden of communicating with and supervising production companies off the state property.

(2) The Texas Film Commission is also responsible for attracting production activity to Texas because of its positive impact on the State's economy and workforce. The use of state properties for free for seven days of each fiscal year will be another tool that the TFC can use to attract filmmakers to Texas, increasing our competitive edge.

§122.2. Definitions.

The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Actual costs--The costs incurred during production activity that have not already been paid for by the production company prior to the activity.

(2) Applicant--The entity coordinating locations for the Production Company, who acts as the representative of the Production Company for the locations.

(3) Certificate of liability insurance--The paper record showing that the Production Company has purchased insurance, the amount insured for, and who is insured under the policy.

(4) Commercials--Either an individual commercial, series of commercials, music video, infomercial, interstitial, or still shoot, that is made for the purpose of promoting a product, service, or idea.

(5) Desired location--The building or grounds that a production company is applying to use.

(6) Episodic television--A project, either narrative or documentary, consisting of a series of installments usually following the same story arc that is intended for distribution via broadcast or digital distribution via cable, satellite, the internet, or mobile electronic device.

(7) Film--Either a narrative or documentary project intended for distribution in theaters or by DVD, internet, or mobile electronic device.

(8) Filming days--The phase of the project during which the content is recorded.

(9) Fiscal year--The period between September 1st and August 31st of the next calendar year.

(10) In-state spending--The amount of money spent by a production company in Texas during all stages of the project.

(11) Location--A building or ground where production activity will take place.

(12) Location fee--An amount charged to the Applicant for each day production activity occurs on the property.

(13) Production activity--Any activity the production company engages in while on location, including, but not limited to, preparation, filming, parking, catering, and take down.

(14) Production company--The entity producing and creating the project, who is ultimately responsible for all production activity.

(15) Production insurance--A financial transaction between a production company and an external company securing all responsibility of damages and accidents while on location to the production company.

(16) Request for Use Application--The application that will be completed by the Applicant to ask for the use of a state property for production activity.

(17) Security deposit--A monetary amount given to the state property before commencement of production activity at that location which gives the state agency some protection for damage done to the location by the Production Company.

(18) State property--All locations owned and operated by the State of Texas for public or private use.

(19) Support location--An area of the property that is being used for production activity other than filming that can either be part of the filming location or a stand-alone location.

(20) Television project--Either a narrative or documentary project, including, but not limited to episodic series, miniseries, television movie (MOW), television pilot, or television episode, that is intended for distribution via broadcast or digital distribution via cable, satellite, the internet, or mobile electronic device.

§122.3. Eligibility.

(a) In order for a production company to be eligible to conduct production activity on a state property, they must meet the following requirements.

(1) must have production insurance in the amount required by the desired location that names the State of Texas as an additionally insured; and

(2) must be a film, television, or commercial project for educational, industrial, or commercial purposes.

(b) A production company may be eligible to receive some or all of their filming days free from location fees if they meet the following minimum requirements

(1) must have production insurance in the amount required by the desired location that names the State of Texas as an additionally insured; and

(2) must have a minimum in-state spending of $250,000 for film or television projects, or a minimum in-state spending of $100,000 for commercials.

§122.4. Ineligibility.

(a) A production company will not be eligible to conduct production activity on a state property if they fall under one of the following conditions.

(1) The production company does not have production insurance in the amount required by the desired location that names the State of Texas as an additionally insured; and/or

(2) The content of the project is pornographic in nature, as defined by Texas Penal Code §43.21.

(b) A production company is ineligible to receive a waiver of location fees if they fall under one of the following conditions.

(1) The production company does not have production insurance in the amount required by the desired location that names the State of Texas as an additionally insured; and/or

(2) The production company does not meet the minimum in-state spending requirements.

§122.5. Application Process.

(a) Once a production company has decided to use a state property for production activity, they must complete a Request for Use Application. The Application can be found at the Texas Film Commission Web site http://www.governor.state.tx.us/divisions/film, or by contacting the Texas Film Commission if internet access is not available or special needs facilitation is required.

(b) Applications must be received before the commencement of production activity at the desired location, and must include the following:

(1) a completed Request for Use Application; and

(2) a certificate of liability insurance in the amount required by the desired location that names the State as an additionally insured.

(c) An Applicant must fill out an application for each state property they wish to use.

§122.6. Approval Process.

(a) All applications will be reviewed in the order they are received by the Texas Film Commission.

(b) Once a production company submits an application, the Texas Film Commission will email the Applicant notifying them that their application has been received.

(c) The Texas Film Commission Staff will then review the application to determine if the production company meets the minimum qualifications, and that all the information provided is clear and reasonable. The Staff will contact the Applicant to verify that all the information on the application is correct. At that time, Applicants will have the ability to amend their application. The Texas Film Commission will determine whether an Applicant's amendment(s) may require them to reapply, and/or whether additional documentation from the Production Company is required for the approval process.

(d) The Texas Film Commission Staff will notify the state agency governing the Applicant's desired location in writing of the request of use once the application has been reviewed. The state agency and the Texas Film Commission will determine if the request is feasible based on location availability, description of production activity, and location's capabilities.

(e) The Texas Film Commission Staff will notify the Applicant in writing of whether or not their request has been approved once the application has been approved by all necessary parties.

(f) Once the Applicant has been approved, a contract will be executed between the Applicant and the State of Texas for use of the property.

§122.7. Applicant's Responsibilities.

(a) The Applicant is responsible for paying location fees.

(1) The Texas Film Commission, in conjunction with the Applicant's desired location and the state agency governing that property, will determine the fee to be charged for each day that production activity will occur on the property based on the length of use, loss of business, and impact on the property. The location fee will be stated in the contract between the Applicant and the state property, and is non-negotiable after that point.

(2) The Applicant shall deposit the location fees to the credit of the State of Texas, Comptroller of Public Accounts, and is expected to do so on or before the first day of production activity. Failure to follow these rules may result in the immediate disqualification of the Applicant or similar consequences.

(b) An Applicant may be required to pay a security deposit to the state agency governing the desired location in the amount determined by the Texas Film Commission and the agency. Failure to follow these rules may result in the immediate disqualification of the Applicant or similar consequences.

(c) The Applicant is responsible for paying any actual costs.

(1) An Applicant is required to reimburse the state property for actual costs incurred during the use of the location. These costs include, but are not limited to, repairs to the property from damage, trash removal, and excessive electricity and water use.

(2) The state agency shall notify the Applicant in writing of any actual costs that the Applicant is responsible for reimbursing. The Applicant must reimburse the cost no later than the 21st day after the date on which the written notification is received.

(d) The Applicant, Production Company and its employees are required to maintain a code of conduct any time they are on location that includes, but is not limited to, the following:

(1) no smoking;

(2) no alcohol;

(3) no illegal drugs;

(4) no soliciting;

(5) following location-specific dress code; and

(6) any other code of conduct required by the specific location.

§122.8. Process During Production Activity.

The Texas Film Commission will supervise all production activity on state property by a production company, and will determine, on a case by case basis, the supervisory conditions needed for the particular activity. The Texas Film Commission reserves the right to be on location during production activity, and to request additional documentation from the production company to determine that they used the state property in the manner agreed upon.

§122.9. Seven Days of Location Fee Waivers.

(a) The Texas Film Commission may allow each state property to be used without a location fee charge for seven days during each state fiscal year, and may determine the allocation of those days. The location fee waiver can only be used for filming days, and cannot count for areas of the state property used as a support location.

(b) The waiver does not apply to any other fees including, but not limited to, security deposits and actual costs.

(c) Projects that are eligible to receive location fee waivers are listed in §122.3 relating to Eligibility.

§122.10. Rights of the Location and the Texas Film Commission.

(a) All state properties and the agencies that govern those properties have the right to decline production activity on their property for reasons including, but not limited too, that the use will significantly interfere with the conduct of state business. A state agency can decide to deviate from the processes listed in this chapter after an initial application has been sent to the Texas Film Commission if it is determined to be the best course of action by both the Texas Film Commission and the agency. A property and/or a state agency can also elect for the Texas Film Commission to act as the liaison for the location.

(b) The Texas Film Commission reserves the right to take themselves out of the contract and negotiations for use of a state property if it is determined that the request does not fit within the parameters of the rules set forth in this chapter or if it is desired by the state agency. The Texas Film Commission also reserves the right to decline a request of use for any reason.

§122.11. Disqualifications.

A production company may be prohibited from conducting production activity on a state property at any time for the following reasons.

(1) Failure to submit required or additional documents;

(2) Submission of false information;

(3) Failure to pay location fees or security deposit on time;

(4) Using the property for pornographic scenes, as defined by Texas Penal Code §43.21;

(5) Ineligibile project as listed in §122.4 relating to Ineleg-ibility; and

(6) Not following location's code of conduct.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800651
Michael Bryant
Assistant General Counsel
Texas Film Commission
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 463-9200

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TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 70. INDUSTRIALIZED HOUSING AND BUILDINGS

16 TAC §§70.10, 70.60, 70.103

The Texas Department of Licensing and Regulation ("Department") proposes amendments to existing rules at 16 Texas Administrative Code, §§70.10, 70.60, and 70.103 regarding the industrialized housing and buildings (IHB) program. The purposes of the proposed amendments are to minimize conflicts of interest for third parties participating in certification inspections and to streamline the process for approving alternative materials and methods of construction. The substance of these rule changes was recommended by the Industrialized Building Code Council ("Council") at its meeting on November 13, 2007.

Section 70.10 is amended to define certain acronyms that are used in proposed amendments to §70.103, related to the Council's approval of alternative materials and methods of construction. Additionally, an unnecessary reference to an address for the International Code Council, Inc. is eliminated.

In §70.60(a) a sentence is deleted concerning the prohibition on the certification team leader being personnel of the third party inspection agency responsible for regular in-plant inspections of the manufacturer or the design review agency responsible for review of the manufacturer's design package. That sentence is moved to new subsection (b), and the words "an employee" are substituted for "personnel." This change clarifies that the prohibition applies only to employees of the third party inspection agency or design review agency. New language is added to subsection (b) to prohibit agencies and team members from soliciting, offering, or agreeing to provide future design review or in-plant inspection services for the manufacturer prior to the manufacturer completing all certification requirements. The prohibition does not apply to the manufacturer's current third party inspection agency or design review agency or to a team member that is employed by the manufacturer's current third party inspection agency or design review agency.

Under the current rule, the Department may use third parties, individuals who are not Department employees, as personnel for the certification teams that perform certification inspections of IHB manufacturing facilities. These individuals are typically employed by or associated with one of two types of entities: third party inspection agencies that perform regular, in-plant inspections of IHB manufacturers or design review agencies that review the design packages of IHB manufacturers. In either case, a potential conflict of interest exists for the individual on the certification team. The agency for whom the individual works may be seeking the business of the manufacturer undergoing the certification inspection, either to perform regular, in-plant inspections for the manufacturer or to perform design review services. The Department has a strong interest in ensuring that such potential business opportunities do not unduly influence the members of the certification team. The Council has expressed concern about such potential conflicts of interest. The proposed rule addresses these concerns by temporarily restricting the team members and agencies providing those team members from soliciting business from that manufacturer. This approach should protect against conflicts of interest while not significantly interfering with agencies' ability to acquire new business.

Section 70.60(e)(9) is amended to specify that the plant certification report must be signed by an authorized Department employee, rather than the certification team leader. This change is necessary because the certification team leader may not be

a Department employee, and the Department needs to retain control over the issuance of the report and the final approval of whether the manufacturer meets certification requirements.

Section 70.103(b) is amended to allow manufacturers or builders the additional option of submitting documentation of alternate materials and methods of construction electronically. New subsection (c) specifies two instances in which alternate materials or methods of construction have been pre-approved by the Council and do not require descriptions to be submitted to the Council for approval. The first instance is where there is a current code evaluation report from International Code Council Evaluation Services (ICC ES). The second is where there is a current product evaluation report or listing from a product certification agency accredited by the International Accreditation Service (IAS) that shows compliance with the applicable mandatory building codes. In these instances, the Department and the Council believe that the evaluation report or listing will provide sufficient evidence of compliance with the mandatory building codes and that no further scrutiny by the Council is needed. The rule clarifies that an industrialized house or building with an evaluation report or listing is not exempt from the requirements of Texas Occupations Code, Chapter 1202.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed amendments are in effect there will be no change in costs or revenue to the State or Department from implementing and enforcing the rules. There will be no fiscal implications to local government.

Mr. Kuntz also has determined that for each year of the first five-year period the amendments are in effect, the public benefit will be added protection against potential conflicts of interest for third parties assisting the Department in certification inspections. The rule will protect public health and safety by helping to ensure that the third parties are not unduly influenced by potential business opportunities with the manufacturer undergoing certification. An additional public benefit will be increased efficiency in the approval process for alternate materials and methods of construction, while not compromising public safety.

Mr. Kuntz also has determined that for each year of the first five-year period the amendments are in effect, there will be some economic costs to persons required to comply with the amended rules. Section 70.60(b) places an additional restriction on third parties and agencies involved in certification inspections, by temporarily prohibiting solicitation of business from the manufacturer undergoing certification. As a result of this prohibition, there is some possibility that third party inspection agencies and design review agencies who supply a certification team member could lose business opportunities. However, the Department believes that, because of the temporary nature of the prohibition, any loss of potential revenue to these businesses will not be significant. Mr. Kuntz has determined that there may be some adverse economic effect on small and micro-businesses as a result of the proposed amendments; therefore, the Department has prepared the following economic impact statement and regulatory flexibility analysis.

Economic Impact Statement and Regulatory Flexibility Analysis

The Department has seven companies registered as both third party inspection agencies and design review agencies. Based on research conducted by the Department's Compliance Division, it is estimated that two to four of the companies are small businesses, and one is a micro-business. The potential adverse economic effect on these businesses results from the prohibition in proposed §70.60(b) on soliciting business from a manufacturer during the certification process. As a result of this prohibition, there is some possibility that third party inspection agencies and design review agencies, including the small and micro-businesses, who supply a certification team member could lose business opportunities. However, the Department believes that because of the temporary nature of the prohibition any loss of potential revenue to these businesses will not be significant. In preparing this proposed rule, the Department considered several alternative methods of achieving the purpose of the rule. One alternative the Department considered was to prohibit the individual team member from soliciting the manufacturer but allow the agency that supplies the team member to do so. The Department rejected this alternative as failing to address sufficiently the conflict of interest problem. If the agency were allowed to actively seek other business from the manufacturer during the certification process, this could exert undue pressure or influence on the team member who works for that agency. The Department did not find other alternatives to be consistent with the health, safety, and environmental and economic welfare of the state. For example, having no prohibition at all on solicitation or exempting small and micro-businesses from the prohibition would fail to address the conflict of interest problem and so would not be consistent with protecting public health and safety. Furthermore, having no prohibition on solicitation could have some adverse economic effect on the manufacturer's current third party inspection agency or design review agency. The agency supplying a certification team member would have special access to the manufacturer, by virtue of participating in the certification inspection, and would arguably have an unfair advantage in competing for the manufacturer's business if allowed to solicit the manufacturer's business during the certification process. The Department and the Council selected the proposed rule because the benefit to public health and safety, from minimizing conflicts of interest in certification inspections, outweighed the small cost or potential revenue loss to affected businesses. The Council considered and rejected an alternative that would have been more burdensome to the businesses. This alternative would have prohibited the team leader and an agency that provides the team leader from soliciting, offering, or agreeing to provide future design review or in-plant inspection services for the manufacturer for 12 months after the manufacturer's certification date. This alternative was considered too restrictive and would have limited the Department's ability to find qualified individuals to serve as certification team leaders.

Comments on the proposal may be submitted to Caroline Jackson, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile (512) 475-3032, or electronically: erule.comments@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code, Chapter 51, which authorizes the Department to adopt rules as necessary to implement that chapter and any other law establishing a program regulated by the Department, and Texas Occupations Code, Chapter 1202. In particular, §1202.101(a) directs the Texas Commission of Licensing and Regulation to adopt rules as necessary to ensure compliance with the purposes of Texas Occupations Code, Chapter 1202 and provide for uniform enforcement of this chapter.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapters 51 and 1202. No other statutes, articles, or codes are affected by the proposal.

§70.10. Definitions.

(a) The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (13) (No change.)

(14) IAS--International Accreditation Service.

(15) [~~(14)~~] ICC--International Code Council, Inc.[~~, 5203 Leesburg Pike, Suite 708, Falls Church, Virginia 22041-3401~~].

(16) ICC ES--International Code Council Evaluation Services.

(17) [~~(15)~~] Industrialized builder--A person who is engaged in the assembly, connection, and on-site construction and erection of modules or modular components at the building site or who is engaged in the purchase of industrialized housing or buildings or of modules or modular components from a manufacturer or from another industrialized builder for sale or lease to the public; a subcontractor of an industrialized builder is not a builder for purposes of this chapter.

(18) [~~(16)~~] Insignia--The approved form of certification issued by the department to the manufacturer to be permanently affixed to the modular component indicating that it has been constructed to meet or exceed the code requirements and in compliance with the sections in this chapter.

(19) [~~(17)~~] Installation--On-site construction (see paragraph (29) [~~(27) of this section~~]).

(20) [~~(18)~~] Installation permit--A registration issued by the department to a person who purchases an industrialized house or building for his/her own use and who assumes responsibility for the installation of the industrialized house or building. A person who applies for an installation permit may not be engaged in the purchase of industrialized housing or buildings or of modules or modular components for sale or lease to the public. A subcontractor of an installation permit holder is not an industrialized builder for the purposes of this chapter.

(21) [~~(19)~~] Lease, or offer to lease--A contract or other instrument by which a person grants to another the right to possess and use industrialized housing or buildings for a specified period of time in exchange for payment of a stipulated price.

(22) [~~(20)~~] Local building official--The agency or department of a municipality or other local political subdivision with authority to make inspections and to enforce the laws, ordinances, and regulations applicable to the construction, alteration, or repair of residential and commercial structures.

(23) [~~(21)~~] Manufacturer--A person who constructs or assembles modules or modular components at a manufacturing facility which are offered for sale or lease, sold or leased, or otherwise used.

(24) [~~(22)~~] Manufacturing facility--The place other than the building site, at which machinery, equipment, and other capital goods are assembled and operated for the purpose of making, fabricating, constructing, forming, or assembly of industrialized housing, buildings, modules, or modular components.

(25) [~~(23)~~] Model--A specific design of an industrialized house, building, or modular component which is based on size, room arrangement, method of construction, location, arrangement, or size of plumbing, mechanical, or electrical equipment and systems therein in accordance with an approved design package.

(26) [~~(24)~~] Module--A three dimensional section of industrialized housing or buildings, designed and approved to be transported as a single section independent of other sections, to a site for on-site construction with or without other modules or modular components.

(27) [~~(25)~~] NFPA--National Fire Protection Association, Batterymarch Park, Quincy, Massachusetts 02269.

(28) [~~(26)~~] Nonsite specific building--An industrialized house or building for which the permanent site location is unknown at the time of construction.

(29) [~~(27)~~] On-site construction--Preparation of the site, foundation construction, assembly and connection of the modules or modular components, affixing the structure to the permanent foundation, connecting the structures together, completing all site-related construction in accordance with designs, plans, specifications, and on-site construction documentation.

(30) [~~(28)~~] Open construction--That condition where any house, building, or portion thereof is constructed in such a manner that all parts or processes of manufacture can be readily inspected at the building site without disassembly, damage to, or destruction thereof.

(31) [~~(29)~~] Permanent foundation system--A foundation system for industrialized housing or buildings designed to meet the applicable building code as set forth in §§70.100, 70.101, and 70.102.

(32) [~~(30)~~] Permanent industrialized building--An industrialized building that is not designed to be transported from one commercial site to another commercial site.

(33) [~~(31)~~] Person--An individual, partnership, company, corporation, association, or any other legal entity, however organized.

(34) [~~(32)~~] Price--The quantity of an item that is exchanged or demanded in the sale or lease for another.

(35) [~~(33)~~] Public--The people of the state as a whole to include individuals, companies, corporations, associations or other groups, however organized, and governmental agencies.

(36) [~~(34)~~] Registrant--A person who, or which, is registered with the department pursuant to the rules of this chapter as a manufacturer, builder, design review agency, third party inspection agency, or third party inspector.

(37) [~~(35)~~] Residential structure--Industrialized housing designed for occupancy and use as a residence by one or more families.

(38) [~~(36)~~] Sale, sell, offer to sell, or offer for sale--Includes any contract of sale or other instrument of transfer of ownership of property, or solicitation to offer to sell or otherwise transfer ownership of property.

(39) [~~(37)~~] Site or building site--A lot, the entire tract, subdivision, or parcel of land on which industrialized housing or buildings are sited.

(40) [~~(38)~~] Special conditions and/or limitations--On-site construction documentation which alerts the local building official of items, such as handicapped accessibility or placement of the building on the property, which may need to be verified by the local building official for conformance to the mandatory building codes.

(41) [~~(39)~~] Structure--An industrialized house or building that results from the complete assemblage of the modules or modular components designed to be used together to form a completed unit.

(42) [~~(40)~~] Third party inspector--An approved person or agency, private or public, determined by the council to be qualified by reason of facilities, personnel, experience, demonstrated reliability, and independence of judgment to inspect industrialized housing, buildings,

and portions thereof for compliance with the approved plans, documentation, compliance control program, and applicable code.

(b) - (c) (No change.)

§70.60. Responsibilities of the Department--Plant Certification.

(a) Prior to being issued decals or insignia, each manufacturing facility will undergo a certification inspection. The plant certification inspection will be conducted by a certification team designated by the department. [~~The team leader may not be personnel of the third party inspection agency responsible for regular in-plant inspections of the manufacturer or the design review agency responsible for review of the manufacturer's design package.~~] The team shall consist of:

(1) a team leader, who is either a department employee, an engineer, or other qualified person as determined by procedures established by the Texas Industrialized Building Code Council; and

(2) one or more department inspectors or third party inspectors.

(b) The team leader may not be an employee of the third party inspection agency (TPIA) responsible for regular in-plant inspections of the manufacturer or the design review agency (DRA) responsible for review of the manufacturer's design package. The following persons may not solicit, offer, or agree to provide future design review or in-plant inspection services for the manufacturer prior to the manufacturer completing all certification requirements:

(1) an agency other than the manufacturer's current TPIA or DRA that provides a certification team member; and

(2) any team member that is not employed by the manufacturer's current TPIA or DRA.

(c) [~~(b)~~] The inspection shall be conducted in accordance with the procedures established by the Texas Industrialized Building Code Council. A certification inspection has two primary purposes:

(1) to verify that the manufacturer is capable of producing modules or modular components that comply with the law and the rules, mandatory building codes, and approved design package; and

(2) to verify that the manufacturer's approved compliance control program will ensure compliance now and in the future.

(d) [~~(c)~~] The team will become familiar with all aspects of the manufacturer's approved design package. Structures on the production line will be checked to assure that failures to conform located by the certification team are being located by the plant compliance control program and are being corrected by the plant personnel. The certification team will work closely with the plant compliance control personnel to assure that the approved design package and compliance control manuals for the facility are clearly understood and followed. If deemed necessary by the certification team, a representative of the design review agency must be present during the inspection. At least one module or modular component containing all systems, or a combination of modules or modular components containing all systems, shall be observed during all phases of construction. The team must inspect all modules or modular components in the production line for Texas during the certification. The plant certification inspection will terminate when the certification team has fully evaluated all aspects of the manufacturing facility.

(e) [~~(d)~~] The certification team will issue a plant certification, or facility evaluation, report to the manufacturer when the department has determined that the manufacturer has met the requirements for certification. A copy of the plant certification report will also be forwarded to the third party inspection agency responsible for in-plant inspections. The manufacturer and third party inspection agency will be responsible for ensuring that all conditions of certification as outlined in the certification report are met. The manufacturer must keep a copy of this report in their permanent records. The report will contain, at a minimum, the following information:

(1) the name and address of the manufacturer;

(2) the names and titles of personnel performing the certification inspection;

(3) the serial or identification numbers of the modules or modular components inspected;

(4) a list of nonconformances observed on the modules or modular components inspected (with appropriate design package references) and corrective action taken in each case;

(5) a list of deviations from the approved compliance control procedures (with section or manual references) observed during the certification inspection with the corrective action taken in each case;

(6) a list of conditions of certification with which the manufacturer must comply to maintain the certification;

(7) the date of certification;

(8) the following statement: "This report concludes that (name of agency), after evaluating the facility, certifies that (name of factory) of (city) is capable of producing (industrialized housing and buildings or modular components) in accordance with the approved building system and compliance control manuals on file in the manufacturing facility and in compliance with the requirements of the Texas Industrialized Building Code Council"; and

(9) the signature of an authorized department employee [~~the certification team leader~~].

(f) [~~(e)~~] If the department determines that the manufacturer is not capable of meeting the certification requirements or that the manufacturer is unable to complete the certification inspection requirements, then the certification team will issue a non-compliance report. The non-compliance report will detail the specific areas in which the manufacturer was found to be deficient and may make recommendations for improvement.

(g) [~~(f)~~] If any personnel of a design review agency or third party inspection agency participate as members of a certification team, the agency is considered a participant in the certification team and is responsible for compliance with Texas Occupations Code, Chapter 1202, rules adopted by the commission, and decision, actions, and interpretations of the council in performing the certification, inspection and related activities.

§70.103. Alternate Materials and Methods.

(a) Alternate materials or methods of construction other than as authorized by the mandatory codes set forth in §70.100 must be approved by the council.

(b) Manufacturers or industrialized builders shall submit descriptions of alternate methods or materials required to be approved by the council to the executive director for consideration by the council. The submittal shall include either 15 legible hard copies of drawings, specifications, and substantiating evidence for each such alternate method or material or all supporting documentation shall be submitted electronically and be in a format that will allow for electronic disbursement of these materials to the council.

(c) The following types of alternate materials or methods of construction have been approved by the council and do not require the manufacturer or industrialized builder to submit descriptions to the council for approval. Materials or methods of construction shall be

used and identified in accordance with the applicable code or product evaluation report or listing.

(1) Alternate materials or methods with a current code evaluation report from ICC ES. An industrialized house or building with a code evaluation report is not exempt from the requirements of Texas Occupations Code, Chapter 1202.

(2) Alternate materials or methods of construction with a current product evaluation report or listing from a product certification agency accredited by the IAS that shows compliance with the applicable mandatory building codes. An industrialized house or building with a product evaluation report or listing is not exempt from the requirements of Texas Occupations Code, Chapter 1202.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 4, 2008.

TRD-200800671
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 463-7348

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CHAPTER 74. ELEVATORS, ESCALATORS, AND RELATED EQUIPMENT

16 TAC §74.80

The Texas Department of Licensing and Regulation ("Department") proposes amendments to 16 Texas Administrative Code ("TAC"), Chapter 74, §74.80 regarding the Elevators, Escalators, and Related Equipment program application fees for initial and renewal inspector registrations, fees for certificates of compliance, and fees for initial and renewal contractor registrations.

The amendments to §74.80(a) propose to lower the application fee for an initial and a renewal inspector registration from $100 to $50. The amendment to §74.80(b)(1) proposes to lower the fee for a certificate of compliance from $30 to $20. The amendments to §74.80(e) propose to lower the fees for an original and renewals of contractor registrations from $300 to $115.

The Department is required to set fees in amounts reasonable and necessary to cover the costs of administering the programs under its jurisdiction. Pursuant to the Department's annual fee review, the fees currently in place are above the amount required by the Department to cover costs. The decrease in fees would not adversely affect the administration and enforcement of the Elevators, Escalators, and Related Equipment program.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed amendments are in effect there will be no cost to state or local government as a result of enforcing or administering the proposed rule.

Mr. Kuntz also has determined that for each year of the first five-year period the amendments are in effect, the public benefit will be lower fees for annual license applications and renewals.

The anticipated economic effect on small or micro-businesses or to persons who are required to comply with the rule as amended will be lower fees for annual license applications and renewals. There will be no additional costs to small or micro-businesses or to persons who may be required to comply with the section as proposed. Since the agency has determined that the rule will have no adverse economic effect on small businesses, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

Comments on the proposal may be submitted by mail to Caroline Jackson, Legal Assistant, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711; by facsimile to (512) 475-3032; or by email to erule.comments@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Health and Safety Code, Chapter 754, Subchapter B, and Texas Occupations Code, Chapter 51, which authorizes the Department's governing body, the Texas Commission of Licensing and Regulation, to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Health and Safety Code, Chapter 754, Subchapter B, and Texas Occupations Code, Chapter 51. No other statutes, articles, or codes are affected by the proposal.

§74.80. Fees.

(a) Inspector registration fees.

(1) original--$50 [~~$100~~]

(2) renewal application--$50 [~~$100~~]

(3) Revised/Duplicate registration card--$25

(b) Certificate of Compliance filing fees:

(1) submitted by building owner with a copy of inspection report within 60 days of the equipment inspection date--$20 [~~$30~~] per unit of equipment;

(2) $10 late filing fee per each unit for every thirty (30) day period if the inspection report, filing fees, and verification about correcting deficiencies in the inspection report are filed after the 90th day from the equipment inspection date, and

(3) $25 per Revised/Duplicate Certificate.

(c) - (d) (No change.)

(e) Contractor Registration fees

(1) original--$115 [~~$300~~]

(2) renewal application--$115 [~~$300~~]

(3) Revised/Duplicate registration card--$25

(f) - (i) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 4, 2008.

TRD-200800672

William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 463-7348

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 157. HEARINGS AND APPEALS
SUBCHAPTER D. INDEPENDENT HEARING EXAMINERS

19 TAC §157.41

The State Board of Education (SBOE) proposes an amendment to §157.41, concerning independent hearing examiners. The amended section as proposed establishes certification criteria for independent hearing examiners. The proposed amendment would require that independent hearing examiners submit fingerprints for the purpose of obtaining criminal history reports and would update the continuing education requirements.

Section 157.41 specifies certification criteria such as license required, experience, continuing education, and annual recertification for independent hearing examiners. The examiners preside over due process hearings involving terminations, suspensions without pay, and nonrenewal of term employment contracts. The examiners also develop findings of fact and conclusions of law, which are referred to the school district board of trustees. The board of trustees reviews the recommendation and votes on it.

The enactment of Senate Bill 9, 80th Texas Legislature, 2007, establishes a program for obtaining the criminal histories of individuals who come into close proximity to students. The proposed amendment to 19 TAC §157.41, Certification Criteria for Independent Hearing Examiners, is proposed in subsection (c) to notify independent hearing examiners that they will be required to provide criminal history in a manner specified by the commissioner of education. This would assure that independent hearing examiners do not have inappropriate criminal histories. Criminal histories are now most often obtained through the submission of fingerprints. In addition, the proposed amendment would specify the subject areas in subsection (f) that satisfy the continuing legal education requirement in civil trial advocacy to ensure that the examiners receive training in evidence, civil procedure, and legal writing. This responds to concerns expressed about the skills of some independent hearing examiners in conducting hearings.

David Anderson, general counsel, has determined that, for the first five-year period the proposed amendment is in effect, there will be fiscal implications for state government as a result of enforcing or administering the amendment. The Texas Department of Public Safety will collect, through a vendor, approximately $3,500 from an estimated 70 independent hearing examiners who will each pay approximately $50 to be fingerprinted. There will be no fiscal implications for local government.

Mr. Anderson has determined that, for each year of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the amendment would be ensuring that certified hearing examiners meet minimum experience, licensing, educational, and ethical standards. There is an anticipated economic cost to persons who are required to comply with the proposed amendment. Independent hearing examiners will pay the cost of being fingerprinted to the vendor of the Texas Department of Public Safety. The one-time cost is anticipated to be approximately $50 per examiner.

There is no economic cost to small businesses. There will be an effect on microbusinesses.

Economic Impact Statement. The proposed rule action will affect between 1-100 microbusinesses (businesses with fewer than 20 employees). Independent hearing examiners are considered microbusinesses. The projected economic impact will be for compliance costs, which is payment of the fingerprinting fee. Microbusinesses will be impacted more than small businesses.

Regulatory Flexibility Analysis. The TEA exercises the exception to considering alternatives to the proposed rule action because minimizing the economic impact could cause the health, safety, and welfare of students to not be protected.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register*.

The amendment is proposed under the Texas Education Code, §21.252(a), which requires the SBOE by rule to establish criteria for the certification of independent hearing examiners.

The proposed amendment implements the Texas Education Code, §21.252(a).

§157.41. Certification Criteria for Independent Hearing Examiners.

(a) License required. An individual who is certified as an independent hearing examiner, hereafter referred to as a "certified examiner," must be licensed to practice law in the State of Texas.

(b) Representations prohibited. A certified examiner, and the law firm with which the examiner is associated, must not serve as an agent or representative of:

(1) a school district;

(2) a teacher in any dispute with a school district; or

(3) an organization of school employees, school administrators, or school boards.

(c) Moral character <u>and criminal history</u>. A certified examiner must:

(1) possess good moral character; and

(2) <u>as demonstrated by a criminal history report process required by the commissioner of education,</u> not have been convicted, given probation (whether through deferred adjudication or otherwise), or fined for:

(A) a felony;

(B) a crime of moral turpitude; or

(C) a crime that directly relates to the duties of an independent hearing examiner in a public school setting.

(d) Status as a licensed attorney. A certified examiner must:

(1) currently be a member in good standing of the State Bar of Texas;

(2) within the last five years, not have had the examiner's bar license:

(A) reprimanded, either privately or publicly;

(B) suspended, either probated or otherwise; or

(C) revoked;

(3) have been licensed to practice law in the State of Texas or any other state for at least five years prior to application; and

(4) have engaged in the actual practice of law on a full-time basis, as defined by the Texas Board of Legal Specialization, for at least five years.

(e) Experience. During the three years immediately preceding certification, a certified examiner must have devoted a minimum of 50% of the examiner's time practicing law in some combination of the following areas, with a total of at least one-tenth or 10% of the examiner's practice involving substantial responsibility for taking part in a contested evidentiary proceeding convened pursuant to law in which the examiner personally propounded and/or defended against questions put to a witness under oath while serving as an advocate, a hearing officer, or a presiding judicial officer:

(1) civil litigation;

(2) administrative law;

(3) school law; or

(4) labor law.

(f) Continuing education. During each year of certification, a certified hearing examiner must receive credit for ten hours of continuing legal education, with three hours in the area of school law and seven hours in the area of civil trial advocacy and legal writing skills, which must include any combination of course work in evidence, civil procedure, and legal writing skills, during the period January 1 to December 31 of each year of certification.

(g) Sworn application. In order to be certified as an independent hearing examiner, an applicant must submit a sworn application to the commissioner of education. The application shall contain the following acknowledgments, waivers, and releases.

(1) The applicant agrees to authorize appropriate institutions to furnish relevant documents and information necessary in the investigation of the application, including information regarding grievances maintained by the State Bar of Texas.

(2) If selected as a certified examiner, the applicant has the continuing duty to disclose grievance matters under subsection (d)(2) of this section at any time during the certification period. Failure to report these matters constitutes grounds for rejecting an application or removal as a certified examiner.

(3) If selected as a certified examiner, the applicant has the continuing duty to disclose criminal matters under subsection (d)(2) of this section at any time during the certification period. Failure to report these matters constitutes grounds for rejecting an application or removal as a certified examiner.

(h) Assurances as to position requirements. In the sworn application, the applicant must:

(1) demonstrate that the applicant currently maintains an office or offices within the State of Texas;

(2) designate the office locations from which the applicant will accept appointments;

(3) demonstrate that the applicant provides telephone messaging and facsimile services during regular business hours;

(4) demonstrate that the applicant possesses a personal computer capable of producing text in the format specified by the commissioner;

(5) agree to attend meetings of independent hearing examiners in Austin, Texas, at the examiner's expense; and

(6) agree to comply with all reporting and procedural requirements established by the commissioner.

(i) Voluntary evaluations. The commissioner may solicit voluntary evaluations from parties to a case regarding their observations of the independent hearings process.

(j) Insufficient examiners in a region. In the event that insufficient numbers of examiners are certified for any geographic region of the state, the commissioner may assign a certified hearing examiner whose office is within reasonable proximity to the school district.

(k) Annual recertification.

(1) Certification expires on December 31 of each calendar year. All examiners seeking recertification shall reapply on a date specified by the commissioner. Certification as a hearing examiner is effective on a yearly basis only and does not confer any expectation of recertification in subsequent years.

(2) Upon written complaint by an attorney who has participated in a hearing and a response from the certified hearing examiner, the commissioner, in his discretion, may decline to recertify a certified hearing examiner, if the commissioner determines that the certified hearing examiner has failed to perform the duties of an examiner in a competent manner. The commissioner may consider, but is not limited to, the following factors:

(A) timeliness;

(B) accuracy and appropriateness of procedural and evidentiary rulings; or

(C) decorum or control.

(3) The commissioner's decision in regard to recertification is final and not appealable.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800652
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 11. TEXAS BOARD OF NURSING

CHAPTER 217. LICENSURE, PEER ASSISTANCE AND PRACTICE

22 TAC §217.19, §217.20

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Board of Nursing or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Board of Nursing (BON) proposes the repeal of §217.19 (Incident-Based Nursing Peer Review), and §217.20 (Safe Harbor Peer Review for Nurses). These repeals were originally proposed in the November 2, 2007, edition of the *Texas Register*. The Board concurrently proposed new rules, but due to the comments responsive to those rules, the Board voted to withdraw the rules and re-propose new rules. Due to the potential expiration of the proposed repeals prior to the adoption of the proposed new rules, it became necessary to withdraw the proposed repeals and re-propose the repeals. Concurrent with these re-proposed repeals are the re-proposed new rules.

Katherine Thomas, Executive Director, has determined that for the first five-year period the proposal is in effect there will be no additional fiscal implications for state or local government as a result of implementing the proposal.

Katherine Thomas, Executive Director, has determined that for each year of the first five years the proposal is in effect, the public benefit will be that the BON will more effectively fulfill its mission. There will not be any effect on small businesses or foreseeable anticipated costs to affected individuals as a result of the implementation of this proposal.

Written comments on the proposal may be submitted to Joy Sparks, Assistant General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701; by email to *joy.sparks@bon.state.tx.us*; or by facsimile to (512) 305-8101.

The proposal is pursuant to the authority of Texas Occupations Code §301.151 which authorizes the BON to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act. Texas Occupations Code §§301.4106, 301.401, 301.402, 301.4025, 301.403, 301.404, 301.405, 301.407, 301.413, 301.457, 303.001, 303.0015, 303.005, 303.0075 and 303.011 are affected and implemented by this proposal.

§217.19. Incident-Based Nursing Peer Review.

§217.20. Safe Harbor Peer Review for Nurses.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 29, 2008.

TRD-200800499
Katherine Thomas
Executive Director
Texas Board of Nursing
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 305-6823

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22 TAC §217.19, §217.20

The Texas Board of Nursing (BON or Board) proposes new §217.19 (Incident-Based Nursing Peer Review and Whistleblower Protections) and §217.20 (Safe Harbor Peer Review for Nurses and Whistleblower Protections). At the July 2007 BON meeting, the Board charged the Nursing Practice Advisory Committee (NPAC) with the task of revising the nursing peer review rules to incorporate the statutes passed during the 2007 Legislative Session. These rules were originally proposed in the November 2, 2007, edition of the *Texas Register*, and the comments received on the initially proposed rules were extensive. The Board incorporated many of the requested changes and made additional revisions. Due to the revisions, however, the Board voted to withdraw the rules and re-propose new rules. Concurrent with these re-proposed new rules are the re-proposed repeals of the existing rules due to the potential expiration of the proposed repeals prior to the adoption of the new rules.

Historical Background

The basic rules and concepts of nursing peer review have been in existence since 1987, with "parity of counsel" added in 1995 and safe harbor peer review in 1997. In 2001, after a year of deliberations on revisions by NPAC as well as response to public comments, the Board repealed §217.17, Minimal Procedural Standards During Peer Review, and adopted two new rules that separated incident-based peer review, the current §217.19, and safe harbor peer review, the current §217.20. It was not until the Board of Nursing and the Board of Vocational Nurse Examiners combined in February 2004 that safe harbor peer review became applicable and accessible to LVNs. The peer review process is outlined in Texas Occupations Code, ch. 303, Nursing Peer Review. Reporting requirements are found in Tex. Occ. Code, ch. 301 (Nursing Practice Act).

Revisions to 22 TAC §217.16, Minor Incidents, went into effect May 17, 2006. It included a new section that permits a peer review committee to utilize a smaller workgroup of the committee to engage in fact-finding, analysis, and dialogue with the nurse (§217.16(g)(2)). The workgroup is permitted to use informal processes, and the nurse's rights are protected through review by the full committee prior to any report to the Board. Proposed revisions to Incident-Based Peer Review incorporate use of a workgroup and tie in the minor incident rule in evaluation of one or more nursing errors or a request for "safe harbor."

Current Review

During the 2007 Legislative Session, Senate Bill 993, addressing nursing peer review, added protections for a nurse who reports a nurse, refuses to engage in conduct, or assists a nurse with filing safe harbor because of unsafe conditions for patients. This includes not only protections for the nurse claiming safe harbor or reporting another nurse, but also for the nurse reporting a facility or non-nurse health care provider who the nurse believes in good faith is endangering patient safety. These "whistleblower" protections have been added at the end of each rule, as well as included in the titles for each rule, to assure that nurses are able to easily find and be aware that they do have these protections when upholding their duty to always advocate for patient safety (22 TAC §217.11(1)(B)).

In response to the first Institute of Medicine (IOM) report, "To Err is Human," the concept of having a peer review committee examine external factors contributing to a nursing error was incorporated into §217.19(a)(7) in 2001. As national patient safety efforts continue to focus on external system factors, SB 993

amended §301.305(c) to require that a peer review committee examine any required report of a nurse to the Board by a nurse's employer or practice setting when a nurse is terminated, suspended for seven or more days, or received other substantive disciplinary action. The intent is to prevent external factors that negatively impact patient safety from going unchecked and unchanged--the issues and surrounding circumstances do not go away because the nurse was terminated, suspended, made a "do not return," etc. New language in §301.305(c) further mandates that the peer review committee report to a facility's patient safety committee if it is determined that external factors did impact or contribute to the nurse's error.

At the July 2007 BON meeting, the Board charged the Nursing Practice Advisory Committee (NPAC or Committee) with the task of revising the nursing peer review rules. The Board's Committee is familiar with the history of nursing peer review, so it considered the new laws and re-evaluated the rules. The Committee rearranged the Safe Harbor Peer Review (22 TAC §217.20) rule for better flow and understanding, to clearly address the nurse's due process rights, and to provide for a nurse to do a brief "initial" request for safe harbor at the time asked to engage in the conduct that is the subject of Safe Harbor. NPAC members also recommended redundancy on the most important step with safe harbor: invoking it at the time the nurse is asked to engage in the conduct or to accept the assignment. The Committee agreed that a nurse may be handicapped by the stress of the situation that is creating the danger to patients, while at the same time trying to recall what steps to take to invoke safe harbor. Repeating this vital step in more than one place in the rule is intended to help the nurse find and carry out this step that protects the nurse's license while enabling the nurse to protect the patients. The BON agreed with and approved these recommendations.

The Board is aware that holding a peer review is a time-consuming process and may be a hardship on a facility or agency trying to staff direct patient care needs at the same time pulling nurses off to participate in peer review. It is hoped that, by permitting the use of a smaller workgroup of the peer review committee, the peer review process can be effective, easier than in the past, less intimidating, less time-consuming, and can promote safer patient care.

Katherine Thomas, Executive Director, has determined that, for the first five-year period the proposal is in effect, there will be no additional fiscal implications for state or local government as a result of implementing the proposal.

Ms. Thomas also has determined that, for each year of the first five years the proposal is in effect, the public benefit will be that the rule language will carry out the legislative intent of Chapter 303 of the Texas Occupations Code. There will not be any foreseeable effect on small businesses or foreseeable anticipated costs to affected individuals as a result of the implementation of this proposal.

Written comments on the proposal may be submitted by mail to Joy Sparks, Assistant General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701; by e-mail to *joy.sparks@bon.state.tx.us*; or by facsimile to (512) 305-8101.

The proposal is pursuant to the authority of Texas Occupations Code, §301.151, which authorizes the BON to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act. Texas Occupations Code, §§301.401, 301.402, 301.4025, 301.403 - 301.405, 301.407, 301.413, 301.457, 303.001, 303.0015, 303.005, 303.0075, and 303.011 are affected and implemented by this proposal.

§217.19. Incident-Based Nursing Peer Review and Whistleblower Protections.

(a) Definitions.

(1) Assignment--Designated responsibility for the provision or supervision of nursing care for a defined period of time in a defined work setting. This includes but is not limited to the specified functions, duties, practitioner orders, supervisory directives, and amount of work designated as the individual nurse's responsibility. Changes in the nurse's licensure responsibilities may occur at any time during the work period.

(2) Bad Faith--Knowingly or recklessly taking action not supported by a reasonable factual or legal basis. The term includes misrepresenting the facts surrounding the events under review, acting out of malice or personal animosity towards the nurse, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process.

(3) Chief Nursing Officer (CNO)--The registered nurse, by any title, who is administratively responsible for the nursing services at a facility, association, school, agency, or any other setting that utilizes the services of nurses.

(4) Conduct Subject to Reporting defined by Texas Occupations Code §301.401 of the Nursing Practice Act as conduct by a nurse that:

(A) violates the Nursing Practice Act (NPA) or a Board rule and contributed to the death or serious injury of a patient;

(B) causes a person to suspect that the nurse's practice is impaired by chemical dependency or drug or alcohol abuse;

(C) constitutes abuse, exploitation, fraud, or a violation of professional boundaries; or

(D) indicates that the nurse lacks knowledge, skill, judgment, or conscientiousness to such an extent that the nurse's continued practice of nursing could reasonably be expected to pose a risk of harm to a patient or another person, regardless of whether the conduct consists of a single incident or a pattern of behavior.

(5) Duty to a patient--A nurse's duty is to always advocate for patient safety, including any nursing action necessary to comply with the standards of nursing practice (§217.11 of this title) and to avoid engaging in unprofessional conduct (§217.12 of this title). This includes administrative decisions directly affecting a nurse's ability to comply with that duty.

(6) Good Faith--Taking action supported by a reasonable factual or legal basis. Good faith precludes misrepresenting the facts surrounding the events under review, acting out of malice or personal animosity, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process.

(7) Incident-Based Peer Review--Incident-based peer review focuses on determining if a nurse's actions, be it a single event or multiple events (such as in reviewing up to five (5) minor incidents by the same nurse within a year's period of time) should be reported to the Board, or if the nurse's conduct does not require reporting because the conduct constitutes a minor incident that can be remediated. The review includes whether external factors beyond the nurse's control may have contributed to any deficiency in care by the nurse, and to report such findings to a patient safety committee as applicable.

(8) Malice--Acting with a specific intent to do substantial injury or harm to another.

(9) Minor incident--Conduct by a nurse that does not indicate that the nurse's continued practice poses a risk of harm to a patient or another person as described in §217.16 of this title.

(10) Nurse Administrator--Chief Nursing Officer (CNO) or the CNO's designee.

(11) Nursing Peer Review Law (NPR Law)--Chapter 303 of the Texas Occupations Code (TOC). Nurses involved in nursing peer review must comply with the NPR Law.

(12) Nursing Practice Act (NPA)--Chapter 301 of the Texas Occupations Code (TOC). Nurses must comply with the NPA.

(13) Patient Safety Committee--Any committee established by an association, school, agency, health care facility, or other organization to address issues relating to patient safety including:

(A) the entity's medical staff composed of individuals licensed under Subtitle B (Medical Practice Act, Texas Occupations Code §151.001, *et seq.*);

(B) a medical committee under Subchapter D, Chapter 161 of the Health and Safety Code (§§161.031 - 161.033); or

(C) a multi-disciplinary committee, including nursing representation, or any committee established by the same entity to promote best practices and patient safety.

(14) Peer Review--Defined by Texas Occupations Code §303.001(5) (NPR Law) as the evaluation of nursing services, the qualifications of a nurse, the quality of patient care rendered by a nurse, the merits of a complaint concerning a nurse or recommendation regarding a complaint. The peer review process is one of fact finding, analysis and study of events by nurses in a climate of collegial problem solving focused on obtaining all relevant information about an event. Peer review conducted by any entity must comply with NPR Law and with applicable Board rules related to incident-based or safe harbor peer review.

(15) Safe Harbor--A process that protects a nurse from employer retaliation and licensure sanction when a nurse makes a good faith request for peer review of an assignment or conduct the nurse is requested to perform and that the nurse believes could result in a violation of the NPA or Board rules. Safe Harbor must be invoked prior to engaging in the conduct or assignment for which peer review is requested, and may be invoked at anytime during the work period when the initial assignment changes.

(16) Texas Occupations Code (TOC)--One of the topical subdivisions or "codes" into which the Texas Statutes or laws are organized. The Texas Occupations Code contains the statutes governing occupations and professions including the health professions. Both the NPA and NPR Law are located within these statutes. The TOC can be changed only by the Texas Legislature.

(17) Whistleblower Protections--Protections available to a nurse that prohibit retaliatory action by an employer or other entity because the nurse:

(A) made a good faith request for Safe Harbor Nursing Peer Review under TOC §303.005(c) (NPR Law) and 22 TAC §217.20 of this title;

(B) refused to engage in an act or omission relating to patient care that would constitute a violation of the NPA or Board rules as permitted by TOC §301.352 (NPA) (Protection for Refusal to Engage in Certain Conduct). A nurse invoking Safe Harbor under § 217.20 of this title must comply with §217.20(g) of this title if the nurse refuses to engage in the conduct or assignment; or

(C) made a lawful report of unsafe practitioners, or unsafe patient care practices or conditions, in accordance with TOC §301.4025 (NPA) (report of unsafe practices of non-nurse entities) and subsection (j)(2) of this section.

(b) Purpose. The purpose of this rule is to:

(1) define minimum due process to which a nurse is entitled under incident-based peer review,

(2) provide guidance to facilities, agencies, schools, or anyone who utilizes the services of nurses in the development and application of incident-based peer review plans,

(3) assure that nurses have knowledge of the plan, and

(4) provide guidance to the incident-based peer review committee in its fact finding process.

(c) Applicability of Incident-Based Peer Review. Texas Occupations Code §303.0015 (NPR Law) requires a person who regularly employs, hires or contracts for the services of ten (10) or more nurses (for peer review of an RN, at least 5 of the 10 must be RNs) to conduct nursing peer review for purposes of TOC §§301.402(e) (NPA) (relating to alternate reporting by nurses to peer review), 301.403 (relating to peer review committee reporting), 301.405(c) (relating to peer review of external factors as part of employer reporting), and 301.407(b) (relating to alternate reporting by state agencies to peer review).

(d) Minimum Due Process.

(1) A licensed nurse subject to incident-based peer review is entitled to minimum due process under TOC §303.002(e) (NPR Law). Any person or entity that conducts incident-based peer review must comply with the due process requirements of this section even if the person or entity does not utilize the number of nurses described by subsection (c) of this section.

(2) A facility conducting incident-based peer review shall have written policies and procedures that, at a minimum, address:

(A) the level of participation of nurse or nurse's representative at an incident-based peer review hearing beyond that required by paragraph (3)(F) of this subsection;

(B) confidentiality and safeguards to prevent impermissible disclosures including written agreement by all parties to abide by TOC §§303.006 and 303.007, 303.0075 (NPR Law) and subsection (h) of this section;

(C) handling of cases involving nurses who are impaired or suspected of being impaired by chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity in accordance with the TOC §301.410, and subsection (g) of this section;

(D) reporting of nurses to the Board by incident-based peer review committee in accordance with the TOC §301.403, and subsection (i) of this section; and

(E) effective date of changes to the policies which in no event shall apply to incident-based peer review proceedings initiated before the change was adopted unless agreed to in writing by the nurse being reviewed.

(3) In order to meet the minimum due process required by TOC ch. 303 (NPR Law), the nursing peer review committee must:

(A) comply with the membership and voting requirements as set forth in TOC §303.003 (NPR Law);

(B) exclude from the committee, including attendance at the peer review hearing, any person or persons with administrative

authority for personnel decisions directly relating to the nurse. This requirement does not exclude a person who is administratively responsible over the nurse being reviewed from appearing before the committee to speak as a fact witness;

(C) provide written notice to the nurse in person or by certified mail at the last known address the nurse has on file with the facility that:

(i) the nurse's practice is being evaluated;

(ii) the incident-based peer review committee will meet on a specified date not sooner than 21 calendar days and not more than 45 calendar days from date of notice, unless:

(I) the incident-based peer review committee determines an extended time period (extending the 45 days by no more than an additional 45 days) is necessary in order to consult with a patient safety committee; or

(II) otherwise agreed upon by the nurse and incident-based peer review committee; and

(iii) includes the information required by subparagraph (D) of this paragraph.

(D) Include in the notice required by subparagraph (C) of this paragraph:

(i) a description of the event(s) to be evaluated in sufficient detail to inform the nurse of the incident, circumstances and conduct (error or omission), including date(s), time(s), location(s), and individual(s) involved. The patient/client shall be identified by initials or number to the extent possible to protect confidentiality but the nurse shall be provided the name of the patient/client;

(ii) the name, address, telephone number of contact person to receive the nurse's response; and

(iii) a copy of this rule (§217.19 of this title) and a copy of the facility's incident-based peer review plan, policies and procedures.

(E) provide the nurse the opportunity to review, in person or by attorney, the documents concerning the event under review, at least 15 calendar days prior to appearing before the committee;

(F) provide the nurse the opportunity to:

(i) submit a written statement regarding the event under review;

(ii) call witnesses, question witnesses, and be present when testimony or evidence is being presented;

(iii) be provided copies of the witness list and written testimony or evidence at least 48 hours in advance of proceeding;

(iv) make an opening statement to the committee;

(v) ask questions of the committee and respond to questions of the committee; and

(vi) make a closing statement to the committee after all evidence is presented;

(G) complete its review no more than fourteen (14) calendar days after the incident-based peer review hearing, or in compliance with subparagraph (C)(ii) of this paragraph relating to consultation with a patient safety committee;

(H) provide written notice to the nurse in person or by certified mail at the last known address the nurse has on file with the facility of the findings of the committee within ten (10) calendar days of when the committee's review has been completed; and

(I) permit the nurse to file a written rebuttal statement within ten (10) calendar days of the notice of the committee's findings and make the statement a permanent part of the incident-based peer review record to be included whenever the committee's findings are disclosed;

(4) An incident-based peer review committee's determination to report a nurse to the Board cannot be overruled, changed, or dismissed.

(5) Nurse's Right To Representation.

(A) A nurse shall have a right of representation as set out in this paragraph. These rights are minimum requirements and a facility may allow the nurse more representation. The incident-based peer review process is not a legal proceeding; therefore, rules governing legal proceedings and admissibility of evidence do not apply and the presence of attorneys is not required.

(B) The nurse has the right to be accompanied to the hearing by a nurse peer or an attorney. Representatives attending the incident-based peer review hearing must comply with the facility's incident-based peer review policies and procedures regarding participation beyond conferring with the nurse.

(C) If either the facility or nurse will have an attorney or representative present at the incident-based peer review hearing in any capacity, the facility or nurse must notify the other at least seven (7) calendar days before the hearing that they will have an attorney or representative attending the hearing and in what capacity.

(D) Notwithstanding any other provisions of these rules, if an attorney representing the facility or incident-based peer review committee is present at the incident-based peer review hearing in any capacity, including serving as a member of the incident-based peer review committee, the nurse is entitled to "parity of participation of counsel." "Parity of participation of counsel" means that the nurse's attorney is able to participate to the same extent and level as the facility's attorney, e.g., if the facility's attorney can question witnesses, the nurse's attorney must have the same right.

(6) A nurse whose practice is being evaluated may properly choose not to participate in the proceeding after the nurse has been notified under paragraph (3)(C) of this subsection. If a nurse elects not to participate in incident-based peer review, the nurse waives any right to procedural due process under TOC §303.002 (NPR Law) and this subsection.

(e) Use of Informal Work Group In Incident Based Peer Review. A facility may choose to initiate an informal review process utilizing a workgroup of the nursing incident-based peer review committee provided there are written policies for the informal workgroup that require:

(1) the nurse be informed of how the informal work group will function, and consent, in writing, to the use of an informal work group. A nurse does not waive any right to incident-based peer review by accepting or rejecting the use of an informal work group;

(2) if the informal work group suspects that the nurse's practice is impaired by chemical dependency or diminished mental capacity, the chair person must be notified to determine if peer review should be terminated and the nurse reported to the Board or to a Board-approved peer assistance program as required by subsection (g) of this section;

(3) the informal work group comply with the membership and voting requirements of subsection (d)(3)(A) and (B) of this section;

(4) the nurse be provided the opportunity to meet with the informal work group;

(5) the nurse have the right to reject any decision of the informal work group and to then have his/her conduct reviewed by the peer review committee, in which event members of the informal work group shall not participate in that determination; and

(6) ratification by the committee chair person of any decision made by the informal work group. If the chair person disagrees with a determination of the informal work group to remediate a nurse for one or more minor incidents, the chair person shall convene the full peer review committee to make a determination regarding the conduct in question; and

(7) the chair person communicate any decision of the informal work group to the CNO or nurse administrator.

(f) Exclusions to Minimum Due Process Requirements. The minimum due process requirements set out in subsection (d) of this section do not apply to:

(1) peer review conducted solely in compliance with TOC §301.405(c) (NPA) relating to review of external factors, after a report of a nurse to the Board has already occurred under TOC §301.405(b) (relating to mandatory report by employer, facility or agency); or

(2) reviews governed by subsection (g) of this section involving nurses whose practice is suspected of being impaired due to chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity;

(3) when a person required to report a nurse believes that a nurse's practice is impaired or suspected of being impaired and has also resulted in a violation under TOC §301.410(b), that requires a direct report to the Board.

(g) Incident-Based Peer Review of a Nurse's Impaired Practice/Lack of Fitness.

(1) When a nurse's practice is impaired or suspected of being impaired due to chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity, peer review of the nurse shall be suspended. The nurse shall be reported to the Board or to a Board-approved peer assistance program in accordance with TOC §301.410 (related to reporting of impairment):

(A) if there is no reasonable factual basis for determining that a practice violation is involved, the nurse shall be reported to:

(i) the Board; or

(ii) a Board-approved peer assistance program, that shall handle reporting the nurse in accordance with §217.13 of this title; or

(B) if there is a reasonable factual basis for a determination that a practice violation is involved, the nurse shall be reported to the Board.

(2) Following suspension of peer review of the nurse, the committee shall proceed to evaluate external factors to determine if:

(A) any factors beyond the nurse's control contributed to a practice violation; and

(B) any deficiency in external factors enabled the nurse to engage in unprofessional or illegal conduct.

(3) If the committee determines under paragraph (2) of this subsection that external factors do exist for either paragraph (2)(A) or (2)(B) of this subsection, the committee shall report its findings to a patient safety committee or to the CNO or nurse administrator if there is no patient safety committee.

(4) A facility, organization, contractor, or other entity does not violate a nurse's right to due process under subsection (d) of this section by suspending the committee's review of the nurse and reporting the nurse to the Board in accordance with paragraph (2) of this subsection.

(5) Paragraph (1) of this subsection does not preclude a nurse from self-reporting to a peer assistance program or appropriate treatment facility.

(h) Confidentiality of Proceedings.

(1) Confidentiality of information presented to and/or considered by the incident-based peer review committee shall be maintained and the information not disclosed except as provided by TOC §§303.006, 303.007, and 303.0075 (NPR Law). Disclosure/discussion by a nurse with the nurse's attorney is proper because the attorney is bound to the same confidentiality requirements as the nurse.

(2) In accordance with TOC §303.0075, a nursing incident-based peer review committee, including an entity contracted to conduct peer review under TOC §303.0015(b), and any patient safety committee established by the same entity, may share information.

(A) A record or determination of a patient safety committee, or a communication made to a patient safety committee, is not subject to subpoena or discovery and is not admissible in any civil or administrative proceeding, regardless of whether the information has been provided to a nursing peer review committee.

(B) The privileges under this subsection may be waived only through a written waiver signed by the chair, vice chair, or secretary of the patient safety committee.

(C) This section does not affect the application of TOC §303.007 (NPR Law) (relating to disclosures by peer review committee) to a nursing peer review committee.

(D) A committee that receives information from another committee shall forward any request to disclose the information to the committee that provided the information.

(3) A CNO or Nurse Administrator shall assure that policies are in place relating to sharing of information and documents between an Incident-Based Nursing Peer Review committee and a patient safety committee(s) that at a minimum, address:

(A) separation of confidential Incident-Based Nursing Peer Review information from the nurse's human resource file;

(B) methods in which shared communications and documents are labeled and maintained as to which committee originated the documents or communications;

(C) the confidential and separate nature of incident-based peer review and patient safety committee proceedings including shared information and documents; and

(D) the treatment of nurses who violate the policies including when a violation may result in a nurse being reported to the Board or a nursing peer review committee.

(i) Committee Responsibility to Evaluate and Report.

(1) In evaluating a nurse's conduct, the incident-based peer review committee shall review the evidence to determine the extent to

which any deficiency in care by the nurse was the result of deficiencies in the nurse's judgment, knowledge, training, or skill rather than other factors beyond the nurse's control. A determination that a deficiency in care is attributable to a nurse must be based on the extent to which the nurse's conduct was the result of a deficiency in the nurse's judgment, knowledge, training, or skill.

(2) An incident-based peer review committee shall consider whether a nurse's conduct constitutes one or more minor incidents under §217.16 (Minor Incidents) of this title. In accordance with that section, the committee may determine that the nurse:

(A) can be remediated to correct the deficiencies identified in the nurse's judgment, knowledge, training, or skill; or

(B) should be reported to the Board for either a pattern of practice that fails to meet minimum standards, or for one or more events that the incident-based peer review committee determines cannot be categorized as a minor incident(s).

(3) An incident-based nursing peer review committee is not required to submit a report to the Board if:

(A) the committee determines that the reported conduct was a minor incident that is not required to be reported in accordance with provisions of §217.16 (Minor Incident) of this title; or

(B) the nurse has already been reported to the Board under TOC §301.405(b) (NPA) (employer reporting requirements).

(4) If the committee determines it is required to report a nurse to the Board, the committee shall submit to the Board a written, signed report that includes:

(A) the identity of the nurse;

(B) a description of the conduct subject to reporting;

(C) a description of any corrective action taken against the nurse;

(D) a recommendation as to whether the Board should take formal disciplinary action against the nurse, and the basis for the recommendation;

(E) the extent to which any deficiency in care provided by the reported nurse was the result of a factor beyond the nurse's control; and

(F) any additional information the Board requires.

(5) If an incident-based peer review committee determines that a deficiency in care by the nurse was the result of a factor(s) beyond the nurse's control, in compliance with TOC §303.011(b) (NPR Law) (related to required peer review committee report when external factors contributed to a nurse's deficiency in care), the committee must submit a report to the applicable patient safety committee, or to the CNO or nurse administrator if there is no patient safety committee. A patient safety committee must report its findings back to the incident-based peer review committee.

(6) An incident-based peer review committee is not required to withhold its determination of the nurse being incident-based peer reviewed, pending feedback from a patient safety committee, unless the committee believes that a determination from a patient safety committee is necessary in order for the incident-based peer review committee to determine if the nurse's conduct is reportable.

(A) If an incident-based peer review committee finds that factors outside the nurse's control contributed to a deficiency in care, in addition to reporting to a patient safety committee, the incident-based peer review committee may also make recommendations for the nurse, up to and including reporting to the Board.

(B) An incident-based peer review committee may extend the time line for completing the incident-based peer review process (extending the 45 days by no more than an additional 45 days) if the committee members believe they need input from a patient safety committee. The incident-based peer review committee must complete its review of the nurse within this 90-day time frame.

(7) An incident-based peer review committee's determination to report a nurse to the Board cannot be overruled, changed, or dismissed.

(j) Nurse's Duty to Report.

(1) A report made by a nurse to a nursing incident-based peer review committee will satisfy the nurse's duty to report to the Board under TOC §301.402 (mandatory report by a nurse) provided that the following conditions are met:

(A) The reporting nurse shall be notified of the incident-based peer review committee's actions or findings and shall be subject to TOC §303.006 (confidentiality of peer review proceedings); and

(B) The nurse has no reason to believe the incident-based peer review committee made its determination in bad faith.

(2) A nurse may not be suspended, terminated, or otherwise disciplined or discriminated against for filing a report made without malice under this section and TOC §301.402(f) (retaliation for a report made without malice prohibited). A violation of this subsection or TOC §301.402(f) is subject to TOC §301.413 that provides a nurse the right to file a civil suit to recover damages. The nurse may also file a complaint with the regulatory agency that licenses or regulates the nurse's practice setting. The BON does not have regulatory authority over practice settings or civil liability.

(k) State Agency Duty to Report. A state agency that has reason to believe that a nurse has engaged in conduct subject to reporting shall report the nurse in writing to:

(1) the Board; or

(2) the applicable nursing peer review committee in lieu of reporting to Board.

(l) Integrity of Incident-Based Peer Review Process.

(1) Incident-Based Peer Review must be conducted in good faith. A nurse who knowingly participates in incident-based peer review in bad faith is subject to disciplinary action by the Board.

(2) The CNO or nurse administrator of a facility, association, school, agency, or of any other setting that utilizes the services of nurses is responsible for knowing the requirements of this rule and for taking reasonable steps to assure that incident-based peer review is implemented and conducted in compliance with the NPA, NPR Law, and this section.

(3) A determination by an incident-based peer review committee, a CNO, nurse administrator, or an individual nurse to report a nurse to the Board cannot be overruled, dismissed, changed, or reversed. An incident-based peer review committee, CNO, and individual nurse each have a separate responsibility to protect the public by reporting a nurse to the Board as set forth in TOC §301.402, §301.405, 22 TAC §217.11(1)(K) of this title, and this section.

(m) Reporting Conduct of other Practitioners or Entities: Whistleblower Protections.

(1) This section does not expand the authority of any incident-based peer review committee or the Board to make determinations outside the practice of nursing.

(2) In a written, signed report to the appropriate licensing Board or accrediting body, and in accordance with TOC §301.4025 (report of unsafe practices of non-nurse entities), a nurse may report a licensed health care practitioner, agency, or facility that the nurse has reasonable cause to believe has exposed a patient to substantial risk of harm as a result of failing to provide patient care that conforms to:

(A) minimum standards of acceptable and prevailing professional practice, for a report made regarding a practitioner; or

(B) statutory, regulatory, or accreditation standards, for a report made regarding an agency or facility.

(i) A nurse may report to the nurse's employer or another entity at which the nurse is authorized to practice any situation that the nurse has reasonable cause to believe exposes a patient to substantial risk of harm as a result of a failure to provide patient care that conforms to minimum standards of acceptable and prevailing professional practice or to statutory, regulatory, or accreditation standards. For purposes of this subsection, an employer or entity includes an employee or agent of the employer or entity.

(ii) A person may not suspend or terminate the employment of, or otherwise discipline or discriminate against, a person who reports, without malice, under this subsection. A violation of this subsection is subject to TOC §301.413 (NPA) that provides a nurse the right to file civil suit to recover damages. The nurse may also file a complaint with the regulatory agency that licenses or regulates the nurse's practice setting. The BON does not have regulatory authority over practice settings or civil liability.

§217.20. Safe Harbor Peer Review.

(a) Definitions.

(1) Assignment--Designated responsibility for the provision or supervision of nursing care for a defined period of time in a defined work setting. This includes but is not limited to the specified functions, duties, practitioner orders, supervisory directives, and amount of work designated as the individual nurse's responsibility. Changes in the nurse's assignment may occur at any time during the work period.

(2) Bad Faith--Knowingly or recklessly taking action not supported by a reasonable factual or legal basis. The term includes misrepresenting the facts surrounding the events under review, acting out of malice or personal animosity towards the nurse, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process.

(3) Chief Nursing Officer (CNO)--The registered nurse, by any title, who is administratively responsible for the nursing services at a facility, association, school, agency, or any other setting that utilizes the services of nurses.

(4) Conduct Subject to Reporting defined by Texas Occupations Code §301.401 of the Nursing Practice Act as conduct by a nurse that:

(A) violates the Nursing Practice Act (NPA) or a Board rule and contributed to the death or serious injury of a patient;

(B) causes a person to suspect that the nurse's practice is impaired by chemical dependency or drug or alcohol abuse;

(C) constitutes abuse, exploitation, fraud, or a violation of professional boundaries; or

(D) indicates that the nurse lacks knowledge, skill, judgment, or conscientiousness to such an extent that the nurse's continued practice of nursing could reasonably be expected to pose a risk of harm to a patient or another person, regardless of whether the conduct consists of a single incident or a pattern of behavior.

(5) Duty to a patient--A nurse's duty is to always advocate for patient safety, including any nursing action necessary to comply with the standards of nursing practice (§217.11 of this title) and to avoid engaging in unprofessional conduct (§217.12 of this title). This includes administrative decisions directly affecting a nurse's ability to comply with that duty.

(6) Good Faith--Taking action supported by a reasonable factual or legal basis. Good faith precludes misrepresenting the facts surrounding the events under review, acting out of malice or personal animosity, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process.

(7) Incident-Based Peer Review--Incident-based peer review focuses on determining if a nurse's actions, be it a single event or multiple events (such as in reviewing up to five (5) minor incidents by the same nurse within a year's period of time) should be reported to the Board, or if the nurse's conduct does not require reporting because the conduct constitutes a minor incident that can be remediated. The review includes whether external factors beyond the nurse's control may have contributed to any deficiency in care by the nurse, and to report such findings to a patient safety committee as applicable.

(8) Malice--Acting with a specific intent to do substantial injury or harm to another.

(9) Minor incident--Conduct by a nurse that does not indicate that the nurse's continued practice poses a risk of harm to a patient or another person as described in §217.16 (Minor Incident) of this title.

(10) Nurse Administrator--Chief Nursing Officer (CNO) or the CNO's designee.

(11) Nursing Peer Review Law (NPR law)--Chapter 303 of the Texas Occupations Code (TOC). Nurses involved in nursing peer review must comply with the NPR Law.

(12) Nursing Practice Act (NPA)--Chapter 301 of the Texas Occupations Code (TOC). Nurses must comply with the NPA.

(13) Patient Safety Committee--Any committee established by an association, school, agency, health care facility, or other organization to address issues relating to patient safety including:

(A) the entity's medical staff composed of individuals licensed under Subtitle B (Medical Practice Act, Texas Occupations Code §151.001, *et seq.*);

(B) a medical committee under Subchapter D, Chapter 161 of the Health and Safety Code (§§161.031 - 161.033); or

(C) a multi-disciplinary committee, including nursing representation, or any committee established by the same entity to promote best practices and patient safety.

(14) Peer Review--Defined by Texas Occupations Code §303.001(5) (NPR Law) as the evaluation of nursing services, the qualifications of a nurse, the quality of patient care rendered by a nurse, the merits of a complaint concerning a nurse or recommendation regarding a complaint. The peer review process is one of fact finding, analysis and study of events by nurses in a climate of collegial problem solving focused on obtaining all relevant information about an event. Peer review conducted by any entity must comply with NPR Law and with applicable Board rules related to incident-based or safe harbor peer review.

(15) Safe Harbor--A process that protects a nurse from employer retaliation and licensure sanction when a nurse makes a good faith request for peer review of an assignment or conduct the nurse is requested to perform and that the nurse believes could result in a violation of the NPA or Board rules. Safe Harbor must be invoked prior to engaging in the conduct or assignment for which peer review is requested, and may be invoked at anytime during the work period when the initial assignment changes.

(16) Texas Occupations Code (TOC)--One of the topical subdivisions or "codes" into which the Texas Statutes or laws are organized. The Texas Occupations Code contains the statutes governing occupations and professions including the health professions. Both the NPA and NPR Law are located within these statutes. The TOC can be changed only by the Texas Legislature.

(17) Whistleblower Protections--Protections available to a nurse that prohibit retaliatory action by an employer or other entity because the nurse:

(A) made a good faith request for Safe Harbor Nursing Peer Review under Texas Occupations Code §303.005(c) and 22 TAC §217.20 of this title; or

(B) refused to engage in an act or omission relating to patient care that would constitute a violation of the NPA or Board rules as permitted by TOC §301.352 (NPA) (Protection for Refusal to Engage in Certain Conduct). A nurse invoking Safe Harbor under §217.20 of this title must comply with §217.20(g) of this title if the nurse refuses to engage in the conduct or assignment; or

(C) made a lawful report of unsafe practitioners, or unsafe patient care practices or conditions, in accordance with TOC §301.4025 (report of unsafe practices of non-nurse entities) and subsection (j)(2) of this section.

(b) Purpose. The purpose of this rule is to:

(1) define the process for invoking Safe Harbor;

(2) define minimum due process to which a nurse is entitled under safe harbor peer review;

(3) provide guidance to facilities, agencies, employers of nurses, or anyone who utilizes the services of nurses in the development and application of peer review plans;

(4) assure that nurses have knowledge of the plan as well as their right to invoke Safe Harbor; and

(5) provide guidance to the peer review committee in making its determination of the nurse's duty to the patient.

(c) Applicability of Safe Harbor Nursing Peer Review.

(1) Texas Occupations Code §303.0015 (NPR Law) requires a person who regularly employs, hires or contracts for the services of ten (10) or more nurses (for peer review of an RN, at least 5 of the 10 must be RNs) to permit a nurse to request Safe Harbor Peer Review when the nurse is requested or assigned to engage in conduct that the nurse believes is in violation of his/her duty to a patient.

(2) Any person or entity that conducts Safe Harbor Nursing Peer Review is required to comply with the requirements of this rule.

(d) Invoking Safe Harbor.

(1) Safe Harbor must be invoked prior to engaging in the conduct or assignment and at any of the following times:

(A) when the conduct is requested or assignment made;

(B) when changes occur in the request or assignment that so modify the level of nursing care or supervision required compared to what was originally requested or assigned that a nurse believes in good faith that patient harm may result; or

(C) when the nurse refuses to engage in the requested conduct or assignment.

(2) The nurse must notify the supervisor requesting the conduct or assignment in writing that the nurse is invoking Safe Harbor. The content of this notification must meet the requirements for a Quick Request Form described in paragraph (3) of this subsection. A detailed written account of the Safe Harbor request that meets the minimum requirements for the Comprehensive Written Request described in paragraph (4) of this subsection must be completed before leaving the work setting at the end of the work period.

(3) Quick Request Form.

(A) A nurse wishing to invoke Safe Harbor must make an initial request in writing that at a minimum includes the following:

(i) the nurse(s) name making the safe harbor request and his/her signature(s);

(ii) the date and time of the request;

(iii) the location of where the conduct or assignment is to be completed;

(iv) the name of the person requesting the conduct or making the assignment; and

(v) a brief explanation of why safe harbor is being requested.

(B) The BON Safe Harbor Quick Request Form may be used to invoke the initial request for Safe Harbor, but use of the form is not required. The initial written request may be in any written format provided the above minimum information is provided.

(4) Comprehensive Written Request for Safe Harbor Peer Review.

(A) A nurse who invokes Safe Harbor must supplement the initial written request under paragraph (3)(A) of this subsection by submitting a comprehensive request in writing before leaving the work setting at the end of the work period. This comprehensive written request must include a minimum of the following information:

(i) the conduct assigned or requested, including the name and title of the person making the assignment or request;

(ii) a description of the practice setting, e.g., the nurse's responsibilities, resources available, extenuating or contributing circumstances impacting the situation;

(iii) a detailed description of how the requested conduct or assignment would have violated the nurse's duty to a patient or any other provision of the NPA and Board Rules. If possible, reference the specific standard (§217.11 of this title) or other section of the NPA and/or Board rules the nurse believes would have been violated. If a nurse refuses to engage in the requested conduct or assignment, the nurse must document the existence of a rationale listed under subsection (g) of this section.

(iv) If applicable, the rationale for the nurse's not engaging in the requested conduct or assignment awaiting the nursing peer review committee's determination as to the nurse's duty. The rationale should refer to one of the justifications described in subsection (g)(2) of this section for not engaging in the conduct or assignment awaiting a peer review determination.

(v) any other copies of pertinent documentation available at the time. Additional documents may be submitted to the committee when available at a later time; and

(vi) the nurse's name, title, and relationship to the supervisor making the assignment or request.

(B) The BON Comprehensive Request for Safe Harbor Form may be used when submitting the detailed request for Safe Harbor, but use of the form is not required. The comprehensive written request may be in any written format provided the above minimum information is included.

(5) The nurse invoking Safe Harbor is responsible for keeping a copy of the request for Safe Harbor.

(6) A nurse may invoke Safe Harbor to question the medical reasonableness of a physician's order in accordance with TOC §303.005(e) (NPR Law). In this situation, the medical staff or medical director shall determine whether the order was reasonable.

(e) Safe Harbor Protections.

(1) To activate protections outlined in TOC §303.005(c) and paragraph (2) of this subsection, the nurse shall:

(A) invoke Safe Harbor in good faith;

(B) notify the supervisor in writing that he/she intends to invoke Safe Harbor in accordance with subsection (d) of this section. This must be done prior to engaging in the conduct or assignment for which safe harbor is requested and at any of the following times:

(i) when the conduct is requested or assignment made;

(ii) when changes occur in the request or assignment that so modify the level of nursing care or supervision required compared to what was originally requested or assigned that a nurse believes in good faith that patient harm may result; or

(iii) when the nurse refuses to engage in the requested conduct or assignment.

(2) Texas Occupations Code §303.005(c) and (h) (NPR Law), provide the following protections:

(A) A nurse may not be suspended, terminated, or otherwise disciplined or discriminated against for requesting Safe Harbor in good faith.

(B) A nurse or other person may not be suspended, terminated, or otherwise disciplined or discriminated against for advising a nurse in good faith of the nurse's right to request a determination, or of the procedures for requesting a determination.

(C) A nurse is not subject to being reported to the Board and may not be disciplined by the Board for engaging in the conduct awaiting the determination of the peer review committee as permitted by subsection (g) of this section. A nurse's protections from disciplinary action by the Board for engaging in the conduct or assignment awaiting peer review determination remain in place for 48 hours after the nurse is advised of the peer review committee's determination. This time limitation does not affect the nurse's protections from retaliation by the facility, agency, entity or employer under TOC §303.005(h) (NPR Law) for requesting Safe Harbor.

(3) If retaliation occurs, TOC §301.413 (NPA) provides a nurse the right to file civil suit to recover damages. The nurse may also file a complaint with the appropriate regulatory agency that licenses or regulates the nurse's practice setting. The BON does not have regulatory authority over practice settings or civil liability.

(4) Safe Harbor protections do not apply to any civil action for patient injury that may result from the nurse's practice.

(f) Exclusions to Safe Harbor Protections.

(1) A nurse's protections from disciplinary action by the Board under subsection (e)(2) of this section do not apply to:

(A) the nurse who invokes Safe Harbor in bad faith;

(B) conduct the nurse engages in prior to the request for Safe Harbor; or

(C) conduct unrelated to the reason for which the nurse requested Safe Harbor.

(2) If the peer review committee determines that a nurse has engaged in conduct subject to reporting that is not related to the request for Safe Harbor, the committee must comply with the requirements of §217.19 (Incident-Based Nursing Peer Review) of this title.

(g) Nurse's Right To Refuse To Engage In Certain Conduct Pending Nursing Safe Harbor Peer Review Determination.

(1) A nurse invoking safe harbor may engage in the requested conduct or assignment while awaiting peer review determination unless the conduct or assignment is one in which:

(A) the nurse lacks the basic knowledge, skills, and abilities that would be necessary to render the care or engage in the conduct requested or assigned at a minimally competent level such that engaging in the requested conduct or assignment would expose one or more patients to an unjustifiable risk of harm; or

(B) the requested conduct or assignment would constitute unprofessional conduct and/or criminal conduct such as fraud, theft, patient abuse, exploitation, or falsification.

(2) If a nurse refuses to engage in the conduct or assignment because it is beyond the nurse's scope as described under paragraph (1)(A) of this subsection:

(A) the nurse and supervisor must collaborate in an attempt to identify an acceptable assignment that is within the nurse's scope and enhances the delivery of safe patient care; and

(B) the results of this collaborative effort must be documented in writing and maintained in peer review records by the chair of the peer review committee.

(h) Minimum Due Process.

(1) A person or entity required by TOC §303.005(i) to provide nursing peer review shall adopt and implement a policy to inform nurses of their right to request a nursing peer review committee determination (Safe Harbor Nursing Peer Review) and the procedure for making a request.

(2) In order to meet the minimum due process required by TOC chapter 303, the nursing peer review committee shall:

(A) comply with the membership and voting requirements as set forth in TOC §303.003;

(B) exclude from the committee membership, any persons or person with administrative authority for personnel decisions directly affecting the nurse;

(C) limit attendance at the Safe Harbor Nursing Peer Review hearing by a CNO, nurse administrator, or other individual with administrative authority over the nurse, including the individual who requested the conduct or made the assignment, to appearing before the safe harbor peer review committee to speak as a fact witness; and

(D) Permit the nurse requesting safe harbor to:

(i) appear before the committee;

(ii) ask questions and respond to questions of the committee; and

(iii) make a verbal and/or written statement to explain why he or she believes the requested conduct or assignment would have violated a nurse's duty to a patient.

(i) Safe Harbor Timelines.

(1) The Safe Harbor Nursing Peer Review committee shall complete its review and notify the CNO or nurse administrator within 14 calendar days of when the nurse requested Safe Harbor.

(2) Within 48 hours of receiving the committee's determination, the CNO or nurse administrator shall review these findings and notify the nurse requesting safe harbor of both the committee's determination and whether the administrator believes in good faith that the committee's findings are correct or incorrect.

(3) The nurse's protection from disciplinary action by the Board for engaging in the conduct or assignment awaiting peer review determination expires 48 hours after the nurse is advised of the peer review committee's determination. The expiration of this protection does not affect the nurse's protections from retaliation by the facility, agency, entity or employer under TOC §303.005(h) for requesting Safe Harbor.

(j) General Provisions.

(1) The Chief Nursing Officer (CNO) or nurse administrator of a facility, association, school, agency, or of any other setting that utilizes the services of nurses is responsible for knowing the requirements of this Rule and for taking reasonable steps to assure that peer review is implemented and conducted in compliance with the NPA and the NPR law.

(2) Safe Harbor Nursing Peer Review must be conducted in good faith. A nurse who knowingly participates in nursing peer review in bad faith is subject to disciplinary action by the Board.

(3) The peer review committee and participants shall comply with the confidentiality requirement of TOC §303.006 and §303.007 relating to confidentiality and limited disclosure of peer review information.

(4) If a nurse requests a Safe Harbor Peer Review determination under TOC §303.005(b) and refuses to engage in the requested conduct or assignment pending the safe harbor peer review, the determinations of the committee are not binding if the CNO or nurse administrator believes in good faith that the committee has incorrectly determined a nurse's duty.

(A) In accordance with TOC §303.005(d), the determination of the safe harbor peer review committee shall be considered in any decision by the nurse's employer to discipline the nurse for the refusal to engage in the requested conduct.

(B) If the CNO or nurse administrator in good faith disagrees with the committee's determination, the rationale for disagreeing must be recorded and retained with the peer review records.

(C) If the CNO or nurse administrator believes the peer review was conducted in bad faith, she/he has a duty to report the nurses involved under TOC §301.402 (NPA) and 22 TAC §217.11(1)(K) of this title.

(D) This section does not affect the protections under TOC §303.005(c)(1) and §301.352 relating to a nurse's protection from disciplinary action or discrimination for making a request for Safe Harbor Peer Review.

(k) Use of Informal Work Group In Safe Harbor Nursing Peer Review. A facility may choose to initiate an informal review process utilizing a workgroup of the nursing peer review committee provided that the final determination of the nurse's duty complies with the time lines set out in this rule and there are written policies for the informal workgroup that require:

(1) the nurse to:

(A) be informed how the informal workgroup will function and that the nurse does not waive any right to peer review by accepting or rejecting the use of an informal workgroup; and

(B) consent, in writing, to the use of an informal workgroup;

(2) the informal workgroup to comply with the membership and voting requirements of subsection (h) of this section;

(3) the nurse to be provided the opportunity to meet with the informal workgroup;

(4) the nurse to have the right to reject any decision of the informal workgroup and have the entire committee determine if the requested conduct or assignment violates the nurse's duty to the patient(s), in which event members of the informal workgroup shall not participate in that determination;

(5) ratification by the safe harbor peer review committee chair person of any decision made by the informal workgroup. If the chair person disagrees with a determination of the informal workgroup, the chair person shall convene the full peer review committee to review the conduct in question; and

(6) the peer review chair person communicate any decision of the informal work group to the CNO or nurse administrator.

(l) Reporting Conduct of other Practitioners or Entities; Whistleblower Protections.

(1) This subsection does not expand the authority of any safe harbor peer review committee or the Board to make determinations outside the practice of nursing.

(2) In a written, signed report to the appropriate licensing Board or accrediting body, and in accordance with TOC §301.4025, a nurse may report a licensed health care practitioner, agency, or facility that the nurse has reasonable cause to believe has exposed a patient to substantial risk of harm as a result of failing to provide patient care that conforms to:

(A) minimum standards of acceptable and prevailing professional practice, for a report made regarding a practitioner; or

(B) statutory, regulatory, or accreditation standards, for a report made regarding an agency or facility.

(3) A nurse may report to the nurse's employer or another entity at which the nurse is authorized to practice any situation that the nurse has reasonable cause to believe exposes a patient to substantial risk of harm as a result of a failure to provide patient care that conforms to minimum standards of acceptable and prevailing professional practice or to statutory, regulatory, or accreditation standards. For purposes of this subsection, an employer or entity includes an employee or agent of the employer or entity.

(4) A person may not suspend or terminate the employment of, or otherwise discipline or discriminate against, a person who reports, without malice, under this section. A violation of this subsection

is subject to TOC §301.413 that provides a nurse the right to file civil suit to recover damages. The nurse may also file a complaint with the regulatory agency that licenses or regulates the nurse's practice setting. The BON does not have regulatory authority over practice settings or civil liability.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 29, 2008.

TRD-200800500
Katherine Thomas
Executive Director
Texas Board of Nursing
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 305-6823

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CHAPTER 223. FEES

22 TAC §223.1

The Texas Board of Nursing proposes an amendment to 22 Texas Administrative Code §223.1, concerning Fees. Effective October 1, 2007, the fee for an Federal Bureau of Investigations (FBI) fingerprint-based criminal history record information, a/k/a criminal background check, was temporarily reduced from $24 to $19.25. (The Texas Department of Public Safety's fee is still $15.) This fee is for an interim period and subject to change. Due to the variable nature of the fee imposed by the FBI and the Texas Department of Public Safety (DPS), the Board grants discretion to the Staff to adjust the fee, as needed, to reflect the actual fee being imposed by the FBI and the DPS instead of coming to the Board each time the fee is changed and requesting the authority to adjust the fee and amend the rule.

Katherine Thomas, Executive Director, has determined that for the first five-year period the proposed amendment is in effect there will be no fiscal implications for state or local government as a result of implementing the proposed amendment.

Ms. Thomas has also determined that for each year of the first five years the proposed amendment is in effect, the public benefit will be that nurse licensees and potential licensees will only be charged for the actual cost of fingerprint criminal background checks. There will be no effect on small businesses.

Written comments on the proposal may be submitted by mail to Joy Sparks, Assistant General Counsel, Texas Board of Nursing, 333 Guadalupe Street, Suite 3-460, Austin, Texas 78701; by e-mail to joy.sparks@bon.state.tx.us; or by facsimile to (512) 305-8101.

The amendment is proposed pursuant to the authority of Texas Occupations Code §301.151 and §301.152 which authorize the Texas Board of Nursing to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act.

No other statutes, articles, or codes are affected by this proposal.

§223.1. Fees.

(a) The Texas Board of Nursing has established reasonable and necessary fees for the administration of its functions.

(1) - (21) (No change.)

(22) fee for Federal Bureau of Investigations (FBI) and Department of Public Safety (DPS) criminal background check for licensees, initial licensure applicants and endorsement applicants as determined by fees imposed by the Criminal Justice Information Services (CJIS) Division and the Texas Department of Public Safety [~~: $39~~]; and

(23) (No change.)

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 29, 2008.

TRD-200800514
Katherine Thomas
Executive Director
Texas Board of Nursing
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 305-6823

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TITLE 28. INSURANCE

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 133. GENERAL MEDICAL PROVISIONS

SUBCHAPTER B. HEALTH CARE PROVIDER BILLING PROCEDURES

28 TAC §133.10

The Texas Department of Insurance, Division of Workers' Compensation ("Division"), proposes amendments to §133.10(a)(3), (b), and (c) of this title (relating to Required Billing Forms/Formats).

The proposed amendment to §133.10(a)(3) of this title provides that medical bills submitted in an electronic format are to be submitted in accordance with Subchapter G (relating to Electronic Medical Billing, Reimbursement, and Documentation). This amendment is necessary because current §133.10(a)(3) incorrectly cites Subchapter F of this chapter as the subchapter that governs electronic billing. Subchapter G of this chapter governs electronic billing. This amendment will correct this citation error.

The proposed amendment to §133.10(b) of this title removes the current National Council for Prescription Drug Programs (NCPDP) Universal Claim Form (UCF) as the prescribed paper billing form for pharmacy billing and requires pharmacists and pharmacy processing agents to submit bills using the Division's form DWC-66 ("DWC-66"). Further, this proposed amendment allows pharmacists and pharmacy processing agents to submit bills on an alternate billing form if the insurance carrier pre-approves the alternate billing form and the alternate billing form provides all information required on the DWC-66. This pro-

posed amendment is necessary because the current NCPDP UCF is not effectively adaptable for use in the Texas workers' compensation system.

Section 133.10(b) of this title designates the DWC-66 as the prescribed paper billing form for pharmacy services rendered on or before December 31, 2007. The DWC-66 is specifically designed for use in the Texas workers' compensation system and has been used in Texas since 1991. The DWC-66 is a very cost effective form, and workers' compensation system participants process this form with automated systems that utilize labor saving technology such as optical character recognition ("OCR") technology.

Effective January 1, 2008, §133.10(b) of this title designates the current NCPDP UCF as the prescribed paper billing form for pharmacy services. The Division adopted the current NCPDP UCF for use in the Texas workers' compensation system because this billing form is a nationally standardized pharmacy billing form that is used in other healthcare delivery systems. Prior to the NCPDP UCF's January 1, 2008 implementation date, the Division requested system participants to provide the Division with feedback regarding any issues they have faced in implementing this form into their processes. System participants have responded that, unlike the DWC-66, the current NCPDP UCF is not a suitable billing form for the Texas workers' compensation system because, with the Division's modified instructions, it is difficult to complete accurately and it will increase the costs associated with pharmacy billing.

The NCPDP UCF, when completed in accordance with its standard instructions, does not capture all information that is necessary for pharmacy billing in the Texas workers' compensation system. In order to make the NCPDP UCF workable in the Texas workers' compensation system, significant modifications to the standard instructions associated with the NCPDP UCF were necessary. For example, the NCPDP UCF does not contain a field for pharmacy benefit manager ("PBM") or pharmacy processing agent ("billing agent") information in cases where a PBM or billing agent processes a pharmacy bill on behalf of a pharmacy. In order to capture this information, the Division's modified instructions require PBM and billing agent information to be placed in fields that describe other information. Further, when completed in accordance with Division instructions, the NCPDP UCF does not provide enough space for carrier information. This necessitates very small fonts and/or overflow into other data fields. The Division's modified instructions also require information to be placed in white spaces, nonstandard locations on the form. These resulting modified instructions, according to system participants, make completing this form difficult; and this may lead to a high number of rejected bills. This would bring inefficiencies and increased costs into the Texas workers' compensation system.

In addition, system participants have responded that requiring small fonts, possible data overflow, and placement of data in nonstandard locations on the NCPDP UCF makes applying OCR technology to the NCPDP UCF difficult. The difficulty in applying OCR technology to the NCPDP UCF would hinder the development of automated systems like those created for the DWC-66 and thus require increased manual intervention to process this form. This will increase the labor costs associated with processing pharmacy bills.

The proposed amendment to §133.10(c) of this title provides that dentists shall use the current American Dental Association (ADA) claim form when billing for dental services. This proposed amendment is necessary to clarify the proper use of the current ADA claim form.

In addition to providing dental services, dentists may provide injured workers with professional medical services such as case management, certification of maximum medical improvement, and the assignment of impairment ratings. Billing for these types of professional medical services requires the use of non-dental codes in the Healthcare Common Procedure Coding System (HCPCS). Dentists have used the current ADA claim form when billing for these types of professional medical services. Carriers reject such bills on the basis that this is not the correct billing form for these types of professional medical services. The proper interpretation of current §133.10(c) is to require dentists to use the current ADA claim form when billing for dental services and, in accordance with §133.10(a)(1) of this title, to use the standard forms used by the Centers for Medicare and Medicaid Services when billing for professional medical services that have non-dental codes. This proposed amendment clarifies this interpretation.

Allen McDonald, Director, Information Management Services, has determined that, for each year of the first five years the proposed amendments are in effect, there will be no fiscal impact on state or local government as a result of enforcing or administering these proposed amendments; and there will be no effect on local employment or the local economy as a result of these proposed amendments.

Mr. McDonald has determined that, for each year of the first five years the proposed amendment to §133.10(a)(3) of this title is in effect, the anticipated public benefit will be the correction of an inaccurate citation in §133.10(a)(3) of this title.

Mr. McDonald has determined that, for each year of the first five years the proposed amendment to §133.10(b) of this title is in effect, the anticipated public benefit will be the continued use of the DWC-66 for pharmacy billing. This benefits the public because the DWC-66 is a cost effective pharmacy billing form that is specifically designed for use in the Texas workers' compensation system. The NCPDP UCF, in its current form, is not effectively adaptable for use in the Texas workers' compensation system; and requiring the use of the NCPDP UCF with the Division's modified instructions will impose inefficiencies and unnecessary costs. This proposed amendment will prevent these inefficiencies and costs from being imposed. Further, this proposed amendment provides system participants with the flexibility to utilize other pharmacy billing forms, through mutual agreement, that are effectively adaptable to the Texas workers' compensation system in lieu of the DWC-66.

Mr. McDonald has determined that, for each year of the first five years the proposed amendment to §133.10(c) of this title is in effect, the anticipated public benefit will be the clarification of the proper use of the ADA claim form and the reduction in the number of rejected bills for professional medical services submitted by dentists.

Mr. McDonald has determined that, for each year of the first five years the proposed amendment to §133.10(a)(3) of this title is in effect, there will be no economic cost to persons who are required to comply with this proposed amendment because this proposed amendment merely corrects a citation error.

Mr. McDonald has determined that, for each year of the first five years the proposed amendment to §133.10(b) of this title is in effect, there will be no economic cost to persons who are required to comply with this proposed amendment. System participants have processed pharmacy bills submitted on the DWC-66,

a nonproprietary form, since 1991. System participants already have in place established procedures and systems to process bills submitted on this form. System participants will, therefore, not incur any costs associated with implementing the DWC-66 into their processes or any additional costs associated with processing bills submitted on the DWC-66. Further, this proposed amendment does not require system participants to use an alternate billing form in lieu of the DWC-66. An alternate billing form may be used by system participants by prior agreement provided the alternate billing form provides all the information required on the DWC-66. Thus, any costs associated with the implementation and use of an alternate billing form will be the result of an agreement between system participants and not a result of this proposed amendment.

Mr. McDonald has also determined that, for each year of the first five years the proposed amendment to §133.10(c) of this title is in effect, there will be no economic cost to persons who are required to comply with this proposed amendment because this proposed amendment clarifies the proper interpretation of current §133.10(c) of this title with regard to the proper use of the ADA claim form.

As required by Government Code, §2006.002(c), the Division has determined that these proposed amendments will not have an adverse economic effect on small or micro-businesses. The Division's analysis of any possible costs for compliance with these proposed amendments that are detailed in the Public Benefit/Cost Note section of this proposal is also applicable to small and micro-businesses. Because these proposed amendments will not have an adverse economic effect on small or micro-businesses, Government Code, §2006.002(c), does not require an economic impact statement or regulatory flexibility analysis.

The Division has determined that no private real property interests are affected by these proposed amendments; and these proposed amendments do not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking or require a takings impact assessment under Government Code, §2007.043.

To be considered, written comments on these proposed amendments must be submitted no later than 5:00 p.m. on March 17, 2008. Comments may be submitted via the Internet through the Division's Internet website at *http://www.tdi.state.tx.us/wc/rules/proposedrules/toc.html* or by mailing your comments to Victoria Ortega, Legal Services, MS-4D, Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744.

Any request for a public hearing must be submitted separately to the Office of General Counsel, MS-1, 7551 Metro Center Drive, Austin, Texas 78744 by 5:00 p.m. on March 17, 2008. If a hearing is held, written and oral comments presented at the hearing will be considered.

These proposed amendments are proposed under Labor Code, §§413.053, 413.011, 413.0111, 408.0251, 402.00111, and 402.061.

Labor Code, §413.053, provides that the Commissioner of Workers' Compensation by rule shall establish standards of reporting and billing governing both form and content. Labor Code, §413.011, requires the Commissioner of Workers' Compensation to adopt the most current reimbursement methodologies, models, and values or weights used by the federal Centers for Medicare and Medicaid Services, including applicable payment policies relating to coding, billing, and reporting and may modify documentation requirements as necessary to meet other statutory requirements. This section also provides that the Commissioner of Workers' Compensation may adopt rules as necessary to implement this section. Labor Code, §413.0111, provides that the rules adopted by the Commissioner of Workers' Compensation for the reimbursement of prescription medications and services must authorize pharmacies to use agents or assignees to process claims and act on behalf of the pharmacies under terms and conditions agreed on by the pharmacies. Labor Code, §408.0251, provides that the Commissioner of Workers' Compensation, by rule and in cooperation with the Commissioner of Insurance, shall adopt rules regarding the electronic submission and processing of medical bills by health care providers to insurance carriers. This section also provides that the Commissioner of Workers' Compensation shall by rule establish criteria for granting exceptions to insurance carriers and health care providers who are unable to submit or accept medical bills electronically. Labor Code, §402.00111, provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code. Labor Code, §402.061, provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act.

The following sections are affected by this proposal: Labor Code §§401.024, 402.00111, 406.010, 408.025, 408.0251, 408.027, 413.007, 413.008, 413.011, 413.0111, 413.015, and 413.053.

§133.10. Required Billing Forms/Formats.

(a) Health care providers shall submit medical bills for payment:

(1) on standard forms used by the Centers for Medicare and Medicaid Services (CMS);

(2) on applicable forms prescribed for pharmacists and dentists specified in subsections (b) and (c) of this section; or

(3) in electronic format in accordance with Subchapter G [~~F~~] of this chapter (relating to Electronic Medical Billing, Reimbursement, and Documentation).

(b) Pharmacists and pharmacy processing agents shall submit bills using the Division form DWC-66. A pharmacist or pharmacy processing agent may submit bills using an alternate billing form if: [~~current National Council for Prescription Drug Programs (NCPDP) Universal Claim Form (UCF) for health care provided on or after January 1, 2008. Pharmacists and pharmacy processing agents shall use the Division form DWC-66 for health care provided on or before December 31, 2007.~~]

(1) the insurance carrier has approved the alternate billing form prior to submission by the pharmacist or pharmacy processing agent; and

(2) the alternate billing form provides all information required on the Division form DWC-66.

(c) Dentists shall submit bills for dental services using the current American Dental Association claim form.

(d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 4, 2008.

TRD-200800670
Norma Garcia
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 804-4715

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 106. PERMITS BY RULE

The Texas Commission on Environmental Quality (commission or TCEQ) proposes the repeal of §§106.142, 106.147, and 106.223.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

This proposed rulemaking will repeal the permits by rule (PBRs) for rock crushers, asphalt concrete plants, and sawmills, which are in §§106.142, 106.147, and 106.223, respectively. The Air Permits Division has developed new standard permits for permanent rock crushers, asphalt concrete plants, and sawmills. These standard permits update administrative and technical requirements for these facilities and are intended to replace the PBRs that are proposed to be repealed.

SECTION BY SECTION DISCUSSION

Subchapter E: Aggregate and Pavement

§106.142 - Rock Crushers

This proposed rulemaking will repeal the PBR for rock crushers. The TCEQ has developed a new standard permit for rock crushers that has provisions regarding public notice, property line distance limitations, operating hours, throughput limitations, monitoring, and recordkeeping. This standard permit was the subject of an extensive protectiveness review based on air dispersion modeling to help ensure that no adverse off-property impacts or nuisance conditions occur. Additionally, the rock crusher standard permit has conditions to help eliminate: use of the standard permit as an immediate precursor for a new source review (NSR) permit; circumvention of public notice for sites applying for an NSR permit; and stacking of facilities at a single site. A facility that is currently authorized under the PBR can remain so until it is moved or modified.

The standard permit for rock crushers has not been issued at this time. This section will not be repealed unless the standard permit has been issued prior to adoption of these proposed rule changes.

§106.147 - Asphalt Concrete Plants

This proposed rulemaking will repeal the PBR for asphalt concrete plants. The TCEQ has issued a new standard permit for hot mix asphalt plants that is available for use in lieu of the PBR. This standard permit includes requirements to minimize dust emissions, property line distance limitations, and opacity and visible emission limitations. These limitations were based on air dispersion modeling, impacts analyses, and plant observations performed to verify the protectiveness of the standard permit. The commission has concluded research that shows that the standard permit is protective of the public health and welfare and facilities that operate under the conditions specified will comply with TCEQ regulations. The PBR for asphalt concrete plants has been unavailable for use since November 2003. A facility that is currently authorized under the PBR can remain so until it is moved or modified.

Subchapter I: Manufacturing

§106.223 - Saw Mills

This proposed rulemaking will repeal the PBR for sawmills. The TCEQ has issued a new standard permit for sawmills that is available for use in lieu of the PBR. The new standard permit for sawmills provides an expedited preconstruction authorization process that may be used for any sawmill complying with the standard permit requirements. The PBR for sawmills has not proven to be a widely useful authorization because it lacks any provision for drying lumber, which is a common practice at most sawmills. The new standard permit authorizes lumber drying in kilns that are directly heated or indirectly heated by a small boiler. Additionally, the new standard permit provides an authorization for an internal combustion engine used for electric power generation. A facility that is currently authorized under the PBR can remain so until it is moved or modified. However, owners or operators currently authorized by the PBR may want to reauthorize the facility under the new standard permit since it includes provisions for drying lumber and generation of electricity.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rulemaking is in effect, fiscal implications, although not anticipated to be significant, are expected for the agency as a result of administration or enforcement of the proposed rules.

The proposed rulemaking would repeal PBRs for rock crushers, asphalt concrete plants, and sawmills. The proposed repeals will not affect owners or operators of a facility authorized under one of these PBRs unless the facility is moved or modified. If this occurs, these entities would be required to obtain a new authorization that would likely be a standard permit. Standard permits are more comprehensive than PBRs and require renewal every ten years. Because of more stringent monitoring requirements, these standard permits help ensure a facility does not have adverse impacts to public health and safety. Registration for a standard permit may require a $900 fee.

Impact to Agency Revenue

Repeal of the PBR for rock crushers could increase revenue collected by the agency. The agency anticipates that as many as 38 rock crushers (1 local government and 37 small businesses) per year may apply for a permit or modify a facility, which would require them to obtain a new authorization that would likely be standard permit. The new standard permit would cost $900, which would be up to $800 more than the cost of a PBR. This change is anticipated to increase the revenue collected in Clean Air Account 0151 by $30,400 per year or $152,000 over a five-year period and is not anticipated to be significant.

The PBR for asphalt concrete plants has been unavailable for use since 2003. The agency has already developed a standard permit for asphalt plants in a previous action which required reg-

istration for a standard permit and implementation of more stringent controls if a facility is moved or modified. However, some facilities continue to operate under PBRs because no move or modification has taken place. Repeal of this section will clarify that PBRs can no longer be issued for asphalt plants, but it will not have a fiscal impact on the agency or on owners of these plants since registrations for the PBR are no longer being accepted.

The repeal of the PBR for sawmills and the issuance of a standard permit would: provide an expedited preconstruction authorization process; ensure all facilities (including drying facilities and internal combustion engines used for the generation of electricity) are permitted and specify internal setback distance requirements, use of best available control technology (BACT) standards, and limit the impact of sawmill operations to off-property receptors. Sawmills will not be required to register or pay a fee for the standard permit. Thus, the agency does not expect revenue to increase for standard permits issued to sawmills. Agency staff is not aware of any local governments that own sawmills.

Impact to Local Governments

One local government is currently authorized by the rock crusher PBR. Owners and operators that move or modify a rock crusher would be required to obtain another authorization that would likely be a standard permit. The standard permit for rock crushers would include conditions that: help ensure that the entity does not adversely impact off-property receptors; specify property line distance limitations, permitted operating hours, throughput limitations, recordkeeping requirements, and monitoring requirements; specify public notice requirements; and make enforcement of permit conditions easier. Specifically, the standard permit would eliminate the stacking of facilities at a single site and curtail the ability of rock crushers to switch from a more stringent new source review permit application midstream to a standard permit application in order to circumvent public notice and contested case hearing requirements.

If this local government moves or modifies its rock crusher facility, permit costs could increase by $800 the first year for a standard permit. A standard permit would also require the installation of a runtime meter and scale belt the first year, which is estimated to cost $3,200. Total cost increases in the first year could be as much as $4,000. Costs are not expected to be incurred in the second through the fifth year the proposed rules are in effect since a standard permit is renewed every ten years, and maintenance and repair costs for runtime meters and scale belts are expected to be minimal.

A review of registrants for the asphalt concrete plant and sawmill PBRs indicated that there were no local governments holding these authorizations. No impact to local governments resulting from the repeal of these PBRs is anticipated.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that, for each year of the first five years the proposed repeals are in effect, the public benefit anticipated from the changes seen in the proposed repeals will be a reduction of impacts to off-site property owners; a clarification of enforceable permit conditions; an update of administrative and technical requirements for rock crushers, asphalt concrete plants, and sawmills; and increased protection of public health and safety because of the requirement to meet the conditions of the new standard permits.

The proposed repeal of the PBR for concrete plants will ensure that agency rules are updated to reflect current practice established in a prior rulemaking. If the owner or operator of a concrete asphalt plant operating under a previously issued PBR decides to move or modify a facility, they will be required obtain a new authorization, which would likely be a standard permit. The standard permit fee is $900. If the asphalt plant is not currently using BACT, compliance costs, required by the permit, could increase by as much as $200,000 to install and operate a fabric filter baghouse instead of a wet scrubber.

Registration under the new standard permit for sawmills will ensure that all facilities at a site are permitted and the permit requires that sawmills comply with internal setback distance requirements, use BACT, and have less impact on off-property receptors. Staff estimates that there may be one sawmill per year that will be required to obtain a new authorization that would likely be a standard permit. These sawmills are expected to be small businesses, and fiscal implications are addressed in the SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT section of this fiscal note.

The proposed repeal of the PBR for rock crushers may result in the issuance of as many as 38 new standard permits per year. Thirty-seven of these entities are expected to be small or micro-businesses and fiscal implications are addressed in the SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT section of this fiscal note.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Adverse fiscal implications are anticipated for owners or operators sawmills classified as small or micro-businesses that choose to modify a facility. For rock crushers, the increase in costs to obtain a standard permit ($800) and install a runtime meter and scale belt ($3,200) are expected to be incurred only in the first year of the first five years the proposed repeals are in effect and only if a facility is moved or modified. Sawmills will not incur permitting costs since the agency does not intend to impose a standard permit fee issued to sawmills. However, if a sawmill owner or operator elects to modify a facility and is not in compliance with distance and BACT requirements, they will incur costs to comply with the standard permit. These costs will vary depending on each sawmill operation. Staff has estimated that moving equipment to comply with internal setback distance requirements could cost $400 to $1,000. Installation of cyclone and collection equipment and hoods to comply with BACT may cost $1,000 to $5,000.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The purpose of the proposed rulemaking is to repeal PBRs for rock crushers, asphalt concrete plants, and sawmills. The repeals will require owners of new and modified facilities to obtain a new authorization, which would likely be a standard permit. Standard permits are generally considered to be more stringent and protective of public health and safety. Therefore, there are no alternative methods of achieving the purpose of the rulemaking other than repealing the use of PBRs for these facilities.

The proposed repeal of these PBRs is expected to increase costs for an estimated 37 rock crushers and one sawmill per year choosing to move or modify facilities. Costs for rock crushers are expected to total $4,000 during the first year the proposed rules are implemented. If a sawmill is not in compliance with standard permit distance and BACT requirements, it could incur costs ranging from $1,400 to $6,000 the first year depending on the changes needed to come into compliance with the standard

permit. To avoid an adverse impact of the proposed repeals, these small businesses could elect not to move or modify any facility at a rock crusher or sawmill site and maintain their operations as permitted by their current PBR.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed repeals do not adversely affect a local economy in a material way for the first five years that the proposed repeals are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that this proposal is not subject to §2001.0225 because it does not meet the definition of a major environmental rule as defined in that statute. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed rulemaking is not a major environmental rule because it is mainly an administrative action only, to repeal the PBRs for rock crushers, asphalt concrete plants, and sawmills, which are in §§106.142, 106.147 and 106.223. The proposed repeals will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

In addition, a draft regulatory impact analysis is not required because the repeals do not meet any of the four applicability criteria for requiring a regulatory impact analysis of a major environmental rule as defined in the Texas Government Code. Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not exceed a standard set by federal law. In addition, this proposal does not exceed an express requirement of state law and is not proposed solely under the general powers of the agency, but is specifically authorized by the provisions cited in the STATUTORY AUTHORITY section of this preamble. Finally, this rulemaking does not exceed a requirement of a delegation agreement or contract to implement a state and federal program.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the proposed repeals are subject to Texas Government Code, Chapter 2007. The primary purpose of the rulemaking is to repeal the PBRs for rock crushers, asphalt concrete plants, and sawmills, which are in §§106.142, 106.147, and 106.223. These repeals do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Promulgation and enforcement of these proposed repeals is neither a statutory nor a constitutional taking because they do not affect private real property. Therefore, these repeals do not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq*.), and commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this proposed rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed repeals will indirectly benefit the environment because repealing the PBRs is expected to result in more standard permit registrations, and standard permits help ensure these types of facilities will have fewer adverse impacts to public health and the environment. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Written comments on the consistency of the proposed rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Most facilities affected by this rule change are minor sources and not subject to the Federal Operating Permits Program. However, if a facility authorized by §§106.142, 106.147, or 106.223 is located at a site with a federal operating permit, any modification of the facility that would require a new authorization would also require revision of the operating permit to reflect the new authorization.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held on March 18, 2008, at 10:00 a.m. in Building E, Room 201S at the Texas Commission on Environmental Quality complex, located at 12100 Park 35 Circle in Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however,

commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Kristin Smith at (512) 239-0177. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Kristin Smith, Texas Register Team, Office of Legal Services, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2007-011-106-PR. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. The comment period closes March 21, 2008. For further information, please contact Blake Stewart, Air Permits Division, at (512) 239-6931.

SUBCHAPTER E. AGGREGATE AND PAVEMENT

30 TAC §106.142, §106.147

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Environmental Quality or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeals are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the Texas Water Code; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeals are also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The repeals are also proposed under THSC, §382.051, concerning Permitting Authority of Commission; Rules, that authorizes the commission to issue permits and adopt rules necessary for permits issued under THSC, Chapter 382; §382.05196, concerning Permits by Rule, which authorizes the commission to adopt permits by rule for types of facilities which will not make a significant contribution of air contaminants to the atmosphere; and §382.057, concerning Exemption, which authorizes the commission to exempt from permitting changes within any facility which will not make a significant contribution of air contaminants to the atmosphere.

The proposed repeals implement THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.05196, and 382.057.

§106.142. Rock Crushers.
§106.147. Asphalt Concrete Plants.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800611
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 239-0177

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SUBCHAPTER I. MANUFACTURING

30 TAC §106.223

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Commission on Environmental Quality or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeal is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the Texas Water Code; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeal is also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The repeal is also proposed under THSC, §382.051, concerning Permitting Authority of Commission; Rules, that authorizes the commission to issue permits and adopt rules necessary for permits issued under THSC, Chapter 382; §382.05196, concerning Permits by Rule, which authorizes the commission to adopt permits by rule for types of facilities which will not make a significant contribution of air contaminants to the atmosphere; and §382.057, concerning Exemption, which authorizes the commission to exempt from permitting changes within any facility which will not make a significant contribution of air contaminants to the atmosphere.

The proposed repeal implements THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.05196, and 382.057.

§106.223. Saw Mills.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800612
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 239-0177

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CHAPTER 335. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE

The Texas Commission on Environmental Quality (commission) proposes repealing current §§335.401 - 335.403 and 335.405 - 335.412 and simultaneously proposes new §§335.401 - 335.403, 335.405, 335.407, 335.409, 335.411, 335.413, 335.415, 335.417, and 335.419.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

In order to make substantial reorganization and amendments to the current rules, the commission proposes new rules for household hazardous waste (HHW) concurrently with the repeal of the existing rules for HHW. The proposed rules would revise and reorganize the rules for the commission's HHW program. The commission encourages the collection of HHW for reuse, recycling, or for its eventual disposal or processing by a method appropriate for hazardous waste.

HHW is municipal solid waste that has the characteristics of hazardous waste. Wastes from households are specifically excluded from classification as hazardous waste by the United States Environmental Protection Agency (EPA) under 40 Code of Federal Regulations (CFR) §261.4(b)(1), which specifies that these wastes are solid waste. The wastes from households that would be hazardous waste except for the exclusion are termed "hazardous household waste" or "household hazardous waste" (the terms have the same meaning and are often abbreviated using the acronym "HHW"). The exemption is based on the facts: 1) that these wastes are typically disposed in very small quantities dispersed in a large volume of municipal solid waste, 2) that the most hazardous types of hazardous wastes are not typically found in consumer products that are typically disposed by households, and 3) that modern landfills are designed to safely hold these materials. Because the collection of HHW involves aggregating relatively large volumes of hazardous materials in a relatively small area, proper practices and proper disposal or processing are needed for the collections to occur safely and to avoid any adverse impacts. The Texas Legislature requires by statute that the commission provide rules covering standards for HHW collections and training of staff working at collections. These rules provide the standards for HHW collections and cover the requirements for training staff to conduct the collections safely.

As solid waste, these materials can usually be legally disposed in the normal municipal solid waste stream and sent to landfills. However, because there are better disposal and processing options available, some entities choose to collect HHW from the public and manage it by having it reused for its intended purpose or having it recycled, processed, or disposed as hazardous waste. Typical HHW includes some household solvents, some pesticides, some paints, some cleaning products, some fuels, some automotive fluids, lead acid batteries, and some other consumer products that all would be hazardous waste when disposed except for the federal exclusion for household wastes. Because these household wastes are exempt from hazardous waste regulation, they can be disposed of as municipal solid waste unless there are other laws or regulations limiting such disposal (such as for lead acid batteries). However, these wastes may include chemicals or constituents that can pose a risk to human health and the environment if not managed appropriately. Communities and other entities throughout the state have organized voluntary efforts to collect HHW to reduce the volume of these products disposed in municipal waste landfills or and to reduce the chances that they will be disposed improperly. These collection programs bring in HHW materials that can be reused for their intended purpose or that are recycled, processed, or disposed of as hazardous waste. These rules establish the requirements for the collection of HHW and other wastes through such programs.

The original rules for HHW collections were adopted in 1988 as joint rules between the Texas Water Commission (TWC) and the Texas Department of Health (TDH). At the time the TWC had jurisdiction over hazardous waste, and the TDH had jurisdiction over municipal solid waste. After jurisdiction for all solid waste was transferred to the commission, a revision was done to the rules in 2001 which primarily changed references from the two former agencies to the commission. Since the name of the commission subsequently changed, the name is updated as needed throughout the rules. Because of the extent of the reorganization and revisions to the existing HHW rules, the commission is proposing the repeal of the existing requirements and is proposing new rules in replacement. This rulemaking proposes the new, revised, and continued provisions for HHW collection activities.

Various approaches are used to collect HHW. Some entities organize one-time or recurrent events where residents may bring their HHW for collection and proper reuse, disposal, or processing. Others have special vehicles that can pick up the wastes from individual households. Other entities have permanent collection facilities open for various days and hours year-round where individuals can bring their HHW for reuse or shipment for proper processing or disposal. Some entities offer as much HHW for reuse as possible, while others focus entirely on aggregating the wastes for disposal or processing. In the 20 years since the rules were first promulgated, new approaches and methods for these collections have developed, which are not covered in the current rules.

To identify issues that should be addressed in the rule revisions, the commission requested open input from any interested parties on the existing rules prior to drafting revisions. The only stakeholders who provided input were entities involved with HHW collection programs, but there was not consensus in the input that was provided. Some stakeholders requested significant changes to the rules, but other stakeholders indicated that only minor changes should be made. Some issues from stakeholders and other issues identified by the commission in administering the program are addressed in the proposed revisions to the rules.

One development in HHW collection programs is the use of mobile collection units to hold collection events in areas convenient to the public rather than at a fixed facility. A mobile collection unit is a vehicle or trailer that can be moved to different locations and that is designed to facilitate the acceptance, classification, storage, and transport of HHW. The existing rules do not contemplate or address the use of such mobile units, and some stakeholders indicated that various provisions should be added. Changes are proposed to specify the requirements that are applicable to mobile collection units.

A second development that some stakeholders indicated should be addressed in the rule revisions is satellite collection areas, which are small fixed facilities that are located in places convenient to the public. While there are no collection programs in Texas using satellite collection areas currently, some stakeholders indicated that they would like provisions to be added for such sites, as either manned or unmanned drop-off stations for HHW. The proposed amendments would allow for manned stations as permanent collection centers, but unmanned stations present significant risks and are not allowed under the current or the proposed rules. Without staff on site to ensure that incompatible wastes are properly separated and stored and to ensure that open or leaking containers are properly secured, unmanned drop-off stations present significant risks to the public and the environment. Since manned stations are the same as permanent collection centers, the proposed rules would allow these facilities subject to the same requirements as any other permanent collection center.

The commission's rules address only the collection of wastes from households. Some stakeholders asked that HHW programs be allowed to accept hazardous waste from conditionally exempt small quantity generators (CESQGs). CESQG waste is hazardous waste generated in small volumes that is exempt from the disposal and processing requirements for hazardous wastes so long as the waste generator meets certain conditions to maintain the exemption. Like HHW, hazardous waste from CESQGs can be placed legally in the normal municipal solid waste stream for disposal in a landfill, although it may include small amounts of acutely hazardous waste, which may be more hazardous than materials generally present in consumer products. Currently, HHW collection programs must prohibit the acceptance of any hazardous wastes. The commission is not proposing to change this prohibition because this rule change would require amending other parts of Chapter 335 that are not covered in this rulemaking. To meet other requirements in this chapter for accepting CESQG wastes, HHW facilities would need to be authorized by the commission. However, several stakeholders, including some who requested changes to be able to take CESQG wastes, were opposed to having HHW programs authorized by the commission.

In addition to updating and reorganizing the rules for the HHW program, the commission is proposing certain other changes as well. Based on stakeholder input, the changes propose shortening the deadline for notifying the agency of collection activities to 45 days, rather than 90 days, in advance of starting a collection. This decreased notice time should provide sufficient time for the agency to review notifications and should allow HHW collection activity planners greater flexibility. The commission proposes eliminating the requirement that a detailed operational plan be submitted to the agency in advance of HHW collection activities. Rather, the commission proposes that HHW operators prepare and implement a detailed operational plan, and make the plan available for agency review upon request. There is certain information currently required for operational plans that the agency will need to continue to review. The agency proposes to incorporate this information into the new notification requirements. The time in advance that HHW programs would need to determine this information would not be changed since the new deadline for notifications is the same as the previous deadline for operational plans (45 days).

Another proposed change is to provide more emphasis and specificity to the training requirements for people involved in HHW collections. By statute, the HHW rules must cover training requirements, but there has been some confusion in the regulated community on what training is actually needed. The commission proposes to amend the rules to make the requirements clearer for the content of the training and the connection of certain training to specific job functions.

SECTION BY SECTION DISCUSSION

The title of Subchapter N is changed from "Household Materials Which Could be Classified as Hazardous Wastes" to "Household Hazardous Waste." In the two sections of the Texas Health and Safety Code that require that the commission provide rules for HHW collections, these two phrases are used as the title of the sections. Because "Household Hazardous Waste" is the term most often used in Texas for this waste, the use of this term throughout the rules would provide clarity and consistency.

Where appropriate throughout the rules, the amendments would add the term "reuse" to the types of activities covered by the provisions since this activity is included in the rules. "Reuse" refers to the use of a product received in a HHW collection for its intended purpose, rather than recycling or disposing the material. "Recycling" in the rules refers to the use of a waste as the raw material for a new product or to the burning of a waste as a fuel for energy recovery.

Because of the distinction between the definitions of "disposal" and "processing" in Chapter 335, the term "processing" is proposed to be added where appropriate throughout the rules to the parts in the current rules that relate to disposal. The term "disposal" in the rules refers to the placement or discharge of wastes to land or water (such as in a landfill or injection well). The term "processing" in the rules refers to the proper treatment or destruction of the material to eliminate its hazardous properties or reduce its volume (such as incineration or burning for energy recovery). Where needed grammatically in the rules, the verbs "dispose" and "process" are used in place of "disposal" and "processing" respectively, for the same reasons. The addition of "processing" in the rules is proposed for clarity rather than to expand the rules. The current rules already include processing in the requirements for disposal.

Where appropriate throughout the rules, the amendments would change "and/or" to other grammatical constructions. Where appropriate throughout the rules when needed to clarify that any combination of listed items, actions, etc. are covered by a rule provision, the words "and" and "or" are also changed to other grammatical constructions. The use of the alternative constructions is meant to clarify the full coverage of a provision that might otherwise not be clear to the regulated community, without resorting to usage of "and/or" per the standards of the *Texas Legislative Council Drafting Manual*.

Where appropriate throughout the rules, the words "shall" and "must" are changed to be consistent with the standards of the *Texas Legislative Council Drafting Manual*. The word "shall" is used to indicate an obligation or requirement for a specific per-

son. The word "must" is used to denote a condition precedent, such that the person or thing specified does not meet the applicable designation or requirement unless the condition is met. Where needed, this issue is discussed further for the specific instances in the discussion below.

Permits for hazardous waste facilities specify the types of materials that the facilities can receive and handle, including specifying when they can receive HHW. The permits are protective of human health and the environment, so additional requirements in these rules are not needed. When appropriate in the rules, the phrase "that is authorized to receive household hazardous waste" is added after "hazardous waste processing storage, or disposal facility." These changes are meant to ensure that HHW operators verify that the hazardous waste facilities selected to receive HHW are properly authorized to receive HHW. When used in the current rules, the phrasing "authorized by the commission" is changed in the proposed rules to "authorized" in order to avoid any confusion that the rules do not allow HHW to be shipped to other states; facilities in other states would still need to be authorized to receive HHW, but their authorization is not from the commission. Because the receiving facilities must also agree to accept the HHW prior to shipment, the phrasing "that have agreed to accept the wastes" is also added in the same places in the rules to clarify that the hazardous waste facilities must agree in advance to accept the HHW.

The original HHW rules were promulgated prior to the development of universal waste rules by the EPA and the commission, and no reference to these rules were added during the revisions made in 2001. Since a limited variety of HHW is allowed to be shipped as universal wastes, the commission proposes to add throughout the rules where it is specified that HHW must be shipped under a uniform waste manifest a new provision that HHW can be shipped as universal waste if allowed under the Universal Waste Rule in Subchapter H, Division 5 of this chapter.

§335.401. *Purpose and Applicability.*

The commission proposes new §335.401 to establish the purpose and applicability of Subchapter N of Chapter 335. Texas Health and Safety Code, §361.029 and §361.429 require the commission to provide rules and to set standards for HHW collection programs, including the training of personnel. This subchapter establishes the requirements for those who collect, aggregate, offer for reuse, recycle, transport, or process or dispose of HHW. New §335.401(a) would add "aggregate," "offer for reuse," and "transport" to the list of activities covered by this subchapter, since these activities are currently regulated and are proposed to continue to be regulated by the subchapter, and would clarify that any combination of the activities is covered.

In new §335.401(b), the commission proposes that the requirements of Subchapter N apply to persons who collect, aggregate, or store HHW for offering for reuse, recycling, processing, or disposal; provide a point of generation pick-up service; operate a mobile collection unit; operate a collection event; operate a permanent collection center; transport aggregated HHW; own or operate a hazardous waste processing, storage or disposal facility receiving HHW; or engage in any combination of these activities. The proposed revisions change the existing provisions in current §335.405 in the following ways: 1) by specifying that any combination of activities is covered; 2) by adding "store" after "collect" and "aggregate," adding "offering for reuse" before "recycling, or disposal", and inserting "processing" between "recycling" and "disposal"; 3) by adding "operate a mobile collection unit"; and 4) by changing the current "transport any hazardous waste required by this subchapter to be manifested" to the proposed "transport any aggregated household hazardous waste." In each case, both the current and proposed rules regulate these activities, so the changes are made for clarity. The change in regards to transportation is made because HHW transported by point of generation pick-up services and by proposed mobile collection units or transported as universal waste (if allowed) would not need to be manifested, but its transport is still regulated.

The proposal would also specify that only hazardous waste processing, storage, or disposal facilities that receive HHW directly from the public are covered by this subchapter. The commission proposes to remove the current provisions for hazardous waste facilities that receive HHW from collection programs because their permits provide adequate oversight for the handling of HHW. Processing, storage, or disposal facilities that receive HHW directly from individuals would only be required to report to the commission the amounts received from individuals (rather than collection programs).

In new §335.401(c), the commission proposes several exclusions for certain types of operations. The commission proposes that the requirements of Subchapter N do not apply to collection programs that collect any combination of batteries, used oil, and paint, as long as no other HHW is collected. These types of collections are often called battery, oil, paint, and antifreeze (BOPA) collections. Because these materials generally do not present substantial hazards in collections, there is no need for additional regulation of these activities by themselves. The collections often take materials that do not have characteristics of hazardous waste, such as antifreeze and tires, which do not significantly increase the hazards associated with collecting the materials. The new proposed exclusion would expand the existing exclusion for collections of used oil or lead acid batteries.

The commission proposes a new exclusion that the requirements of Subchapter N do not apply to collection programs that receive *de minimus* amounts of HHW (i.e., collection of less than 100 pounds of HHW per year). Because the amounts involved are about the same as might be expected from a household, the collection does not present any more risk than normal household disposal of HHW.

The commission proposes a new exclusion that the requirements of Subchapter N do not apply to retail businesses that take wastes from customers that are similar in nature to the products sold by the business. Some retailers, such as those selling lead acid batteries, are required by law to accept back from customers used products. Other retailers, such as many that sell motor oil, offer such services to their customers. Since these programs accept limited varieties of waste from many sources (households, businesses, government, etc.) which could conflict with the prohibition in these rules from accepting hazardous waste along with HHW, these programs should not be subject to these rules. The limited variety of wastes avoids much of the potential risk from general HHW collections, and the risks from used products are generally similar to those for new items in stock so there is little risk from retailers handling such wastes.

The commission proposes a new exclusion that the requirements of Subchapter N do not apply to collections primarily intended to receive wastes from agricultural operations that also take incidental amounts of HHW, if there is no fee charged for taking wastes and if registered transporters are used to take the collected wastes to hazardous waste processing,

storage, or disposal facilities. The commission intentionally is not adding a provision for pesticides shipped as universal wastes because this addition would make this exclusion too broad. The collections are generally held in or near rural areas for farmers and others involved with agriculture. In many cases, household wastes from farms are brought with the wastes from agricultural operations, and their acceptance does not present any increased risk for the collection activities. Since some of the agricultural waste pesticides and other waste materials are hazardous waste, these collections would be prohibited from taking HHW unless excluded. Since HHW collection programs are usually very limited in rural areas, the exclusion would allow better processing or disposal options for the HHW other than disposal as municipal solid waste, which can be buried or burned on the property of the generator in many rural areas and presents a greater risk to public health and the environment than normal disposal into landfills that are designed to hold HHW safely.

The commission proposes a new exclusion that the requirements of Subchapter N do not apply to the collection of used electronics for reuse. When electronic items are received for later evaluation of whether they are still useful and are handled in a manner that does not break them, they are products rather than wastes. As products, these materials are not HHW. The exclusion is proposed because of some misunderstanding of this issue in the regulated community.

In new §335.401(d), the commission proposes that the executive director may waive the requirements of this subchapter when necessary during emergencies or disasters. This provision anticipates occasions, such as flood and hurricane recovery efforts, when immediate action is required to safely collect HHW for appropriate processing or disposal. During emergency responses, there is not time available for submitting notifications and developing operational plans weeks in advance of collecting HHW. The disruption of trash collection services that often occurs in such circumstances may inhibit citizens' ability to legally dispose of HHW and may increase risks of improper storage or disposal. This change would provide for suspending any parts of the rules by the executive director in any extraordinary circumstance where this action is needed to protect human health and the environment.

§335.402. *Definitions.*

The commission proposes new §335.402 to establish definitions of terms used in the subchapter. For clarity, language would be added to the introductory paragraph of the section to note that the definitions in 30 TAC Chapter 3 and §335.1 apply to this subchapter. The current definition of "aggregate" would be expanded to include the different types of HHW programs defined in the proposed rules and to include reuse as an option for disposition of collected HHW.

The current definition of "collection center" would be divided into new definitions of "collection event" and "permanent collection center" based primarily on whether HHW is stored for 24 hours or longer to allow distinctions between these types of programs in the rules because of the greater risks associated with longer term storage. As used in Chapter 335, the term "storage" includes, for one-day collection events, the time between the filling of a shipping container and its being transported. Although this period is generally much less than 24 hours for one-day collections, the period of "less than 24 hours" is used in the proposed definition of "collection event" to allow flexibility to conduct very large or very long one-day collection events by ensuring sufficient time to package collected wastes for transport.

The current definitions of "collector," "hazardous waste processing, storage, and disposal facility," and "household" are retained in the proposed new rule. The current definitions of "division" and "recurring collection program" are not included in the proposed new rule because these terms would not be used in the revised rules. The current definition of "hazardous household waste" is proposed to be changed to "household hazardous waste," to reflect common usage, and is based on the exemption provided in 40 CFR §261.4(b)(1). The term can be used interchangeably with the term "hazardous household waste," as proposed in the definition.

The revisions would add a definition for "inclement weather" to clarify that collections need to be prepared for severe weather, high winds, and temperature extremes, rather than just minor rain events. There has been confusion on this issue for the regulated community, but the dictionary definition of "inclement" is "severe."

A new definition of "mobile collection unit" is proposed to add this type of collection program to the rules.

A new definition for "operator" is proposed because the definition of this term in §335.1 is limited to operators of hazardous waste facilities; however, because the term is also used for operators of hazardous waste processing, storage, or disposal facilities, the definition also incorporates the definition from §335.1 when the context clearly refers to operators of hazardous waste processing, storage, or disposal facilities. The commission proposes a new definition for "personnel" because the definition of this term in §335.1 is limited to hazardous waste and industrial solid waste facilities, which do not include HHW operations; similar to the definition in §335.1, the proposed definition would include all operator staff, contractor staff, and volunteers at a HHW facility whose duties could have a direct impact on compliance with this subchapter. A new definition of "point of generation pick-up service" is proposed to ensure clarity of the use of the term in the rules; the definition covers all collections done by an operator at households where HHW is received directly from residents at households or is left out for collection at households (as opposed to being brought to a central location by individuals).

§335.403. *General Requirements for Household Hazardous Waste Collections.*

The commission proposes new §335.403 to establish the general requirements for HHW collection. In new §335.403(a), the commission proposes that, except for an owner or operator of a hazardous waste processing, storage, or disposal facility that is authorized to receive HHW, no person can engage in activities regulated by this subchapter without first submitting a notification to the executive director.

In new §335.403(b), the commission proposes requirements for the required notifications. Using a form provided by the commission, an operator would need to submit a notification to the executive director 45 days prior to starting HHW collection activities and resubmit a notification for on-going collection operations whenever information in the previous notification changes. The commission proposes that separate notifications be sent for each collection location to be used, but that multiple collections at a single location may be covered in a single notification if all information other than the dates is the same. The commission proposes to require a notification to include: 1) the identification of the operator and contact person and contact information for

each; 2) the dates and hours of operation; 3) both the address of the property and location of the collection site on the property for collection events, permanent collection centers, and mobile collection units; 4) for point of generation collection centers and mobile collection units, the address of the collection event or permanent collection center where the collected wastes will be delivered or a statement that the aggregated HHW will be transported to a processing, storage, or disposal facility; 5) the name of the owner of the property to be used for holding collections, and an attached letter granting permission for use if the owner is different than the operator; 6) areas to be served by collection activities; 7) types by waste category of materials expected to be collected; 8) for permanent collection centers (including any sites where HHW would be stored for 24 hours or longer) a properly completed TCEQ Core Data Form attached; and 9) the planned disposition of collected materials, including the name, address and U.S. Environmental Protection Agency identification number for each transporter to be used and each hazardous waste or recycling facility that is planned to receive the wastes collected. The elements of currently required notifications are retained in the revised notifications. The hours of operation of HHW collections and facilities would be added to the notification because this information is needed for the commission's oversight of these programs. The address of the collection site, the on-site location of the collection area, the geographic area covered by the collection, the types and approximate amounts of HHW expected, information related to the disposition of aggregated wastes (with the addition of the address for any transporter to be used), and documentation of financial assurance for non-governmental entities conducting HHW collections would be moved from the operational plan to the new notification because the commission continues to need to receive this information although the operational plan would no longer be submitted routinely. The TCEQ Core Data Form would be added to the information submitted by permanent collection centers (including sites where HHW is stored longer than 24 hours) so that these facilities can be entered into the commission's Central Registry. Documentation of landowner consent to use property not owned by the operator would be added to ensure that landowners are aware of and allow the waste collection activities. The current requirements that notifications cover the conceptual organization for the collection efforts and details on public information and education efforts would be deleted.

In new §335.403(c), the commission proposes to require that owners or operators of private permanent collection centers provide financial assurance along with their notification of operations. The financial assurance mechanism would be required to be an original signed version of a mechanism that is acceptable to the executive director. Prior to filing a notification, operators of non-governmental permanent collection centers would be required to provide sufficient information to the executive director to allow the agency to determine an acceptable amount, format and type of financial assurance. Operators, other than governmental entities, would not be allowed to operate permanent collection centers without having financial assurance in place.

In §335.403(d), the commission proposes to retain the following operating parameters for HHW collections: 1) the requirement that an operational plan be developed prior to and followed during HHW collection activities; 2) the prohibition against HHW collections accepting hazardous waste or Class 1 industrial waste (the latter term is changed to "Class 1 waste" to be consistent with the definition in §335.1); 3) the requirement that wastes be processed or disposed of only at hazardous waste processing, storage, and disposal facilities authorized to receive HHW that have agreed to accept the wastes; and 4) the requirement to have aggregated HHW from a permanent collection center or collection event transported only by an authorized hazardous waste transporter. HHW collected by a mobile collection unit or point of generation pickup service would be required to be delivered to a permanent collection center or collection event or to be transported by an authorized hazardous waste transporter. This amendment would restrict point of generation pickup services from delivering HHW directly to a hazardous waste processing, storage, or disposal facility unless registered as a hazardous waste transporter because of the increased risk from transporting larger loads or longer distances by entities that have not complied with the transporter registration process.

The commission proposes to remove the requirement that operational plans be submitted to the commission and to specify that HHW programs must follow their plans during collections and to use the plans in training individuals who work at the collections. The commission proposes to continue requiring the one-year records retention for HHW collections, but reword the language for clarity. Because the amounts of wastes collected must be reported to the legislature annually, the commission proposes to add annual reporting requirements for all waste collections covered by this subchapter, including a deadline of February 1st for the previous calendar year and the use of forms provided by the commission for the reports in order to ensure consistency in the reporting.

Hazardous waste processing, storage, or disposal facilities are subject to permitting requirements that are protective of human health and the environment. In order to accept HHW, their operating permit must allow this activity. Since the permits provide sufficient oversight for these types of facilities on how HHW is handled on-site, the commission proposes in new §335.403(e) to specify that hazardous waste processing, storage, or disposal facilities that accept HHW directly from the public are subject only to the reporting requirements of this section, as long as their operating permit allows HHW to be accepted.

§335.405. *Operational Plans.*

The commission proposes new §335.405 to establish detailed requirements for developing, revising, retaining, and following operational plans for HHW collections. The purpose of operational plans is to ensure both that each collection is properly planned and conducted and that personnel are properly trained on the plans and procedures for the specific collection. The commission proposes retaining the current requirement that any person collecting HHW develop and maintain an operational plan, and adding both that the operational plan be maintained in certain locations and that the operational plan be provided to the executive director upon request.

The commission proposes to retain the requirements that operational plans contain certain information, but there are some changes on the specific information required. The expected types and amounts of HHW and other household wastes proposed for collection are currently required and are still needed for efficient planning of HHW collection operations; this information would still be required to be in the operational plan, as well as covered in the notification. The commission proposes adding a requirement that an operational plan must describe the types and amounts of HHW that would be accepted by or transferred to a collection event or permanent collection center after collection by a mobile collection unit or a point of generation collection service unless the collections are conducted by a single oper-

ator; this provision is intended to require coordination among different operators for the proper transfer of HHW between operators. The requirement to cover the minimum number of personnel needed for conducting HHW activities and their functions would be retained with clarification that this provision applies to operator's staff, contractors, volunteers, etc., but the current requirement for information on their qualifications would be changed to an explanation of how the training requirements that apply to their functions have been or will be met.

The commission proposes to retain the current requirements that the operational plans include information on planned disposition of collected wastes, but to make mandatory the consideration of an expanded hierarchy of processing and disposal options ranked by their relative environmental benefit. In order to provide the maximum environmental benefit for the funds expended, it is important that all HHW collection programs consider these issues. The hierarchy is expanded to include the reuse of a product for its intended purpose as the most environmentally beneficial option since such use removes the need for processing or disposal and reduces the need for manufacturing new product; reuse is split from and placed above recycling in the new hierarchy because of the greater benefits. The hierarchy is expanded to include recycling for energy recovery as the third-level option since it is less beneficial than reuse for the intended purpose or recycling to make new products but more beneficial to the environment than the other current processing and disposal options. The other current processing and disposal options are retained but renumbered in the new hierarchy in the same order of decreasing benefits as in the current hierarchy.

The proposal for operational plans would continue to include detailed procedures to avoid accepting hazardous waste and Class 1 waste and the methods used to classify and control wastes received, but with new lists of certain issues to be covered in each of these discussions. The procedures to ensure that prohibited wastes are not received are proposed to include at least the screening procedures for collection participants, the questions that will be asked of the participants on this issue, and the quantities or types of wastes that would require further explanation prior to acceptance. Because many businesses use consumer products that are also used by households and because there may be a financial incentive for non-household businesses to try to deliver their waste to these collection events, a variety of mechanisms is needed to ensure that hazardous waste or Class 1 waste is not received as HHW, and the three mechanisms listed appear to be the most effective combination. In order to allow for sufficient planning and training for HHW collections to be conducted safely and efficiently, the discussion of methods used to classify and control wastes is proposed to cover the following: 1) the waste streams that will be accepted and rejected; 2) the types of shipping containers and storage areas for each waste stream; 3) the methods used to categorize waste prior to packaging for shipment and processing or disposal; 4) the methods used to handle and identify unknown wastes; 5) bulking procedures, if any would be used; 6) procedures for handling containers that are leaking, unsealed, or contaminated externally when received; and 7) procedures for wastes with special handling and processing or disposal needs, if any would be accepted. A non-exclusive list of certain common wastes with special handling and processing or disposal needs is included in the proposal for the convenience of the regulated community.

The commission proposes to retain coverage in the operational plans of contingencies for inclement weather, but with clarification of types of weather to be covered. Historically, most operational plans have discussed personal rain gear or tents for rain protection and shade. However, "inclement" means "severe," so plans for more extreme weather are supposed to be covered under the rules. Since protection from rain, wind, extreme temperatures, and severe storms can be important to conducting collections safely, the proposal lists all of these for inclusion in the discussion.

The commission proposes to add a requirement that operational plans discuss in detail recordkeeping for wastes received and sent for proper processing or disposal. The current and proposed rules have requirements for recordkeeping under provisions for temporary storage, so this part of a new operational plan would discuss how the requirements would be met.

The proposal for operational plans would drop the requirement for an area map since those involved in the collection should be familiar with the area. The commission proposes to retain the current requirement for a site map to be attached to an operational plan, and would make mandatory the depiction of improvements, boundaries, traffic flow, unloading points, emergency vehicles location, and classification and storage areas. These are the salient features that are most useful for the site maps. The maps are useful in depicting how a collection site will be arranged and run for planning and conducting collections and for training staff. The term for the map in the rules is changed from "planimetric map" to "site map" for clarity and because the commission recognizes that having topographic features on the maps could be beneficial in some respects, such as planning for spill responses and evacuations.

The commission proposes to retain the requirement for an attachment to the operational plan covering evidence of competency including experience and qualifications of key personnel, but would require that copies of training certificates be included. Because certain training is required for specific job functions and specific knowledge is needed to conduct collections safely, it is important that a mechanism be in place to allow efficient evaluation of whether all the training requirements are covered for a collection. Having the training documented in the operational plan will allow collection programs to monitor this issue easily.

The commission proposes to replace the current provisions for a detailed discussion of safety, spill and fire response, and related topics with a required attachment of a health and safety plan, including a non-exclusive list of specific elements. The requirements in the current rules related to safety are reflected in the proposed health and safety plan with additional detail provided for clarity concerning the required detailed discussion on safety, fire control, and spill response. The joining of these parts of the current requirements into a single health and safety plan is proposed to allow easy reference during planning, training, and emergencies. The new health and safety plan attachment would be required to include at least the following information: 1) the location and contents of first aid kits at sites and in collection vehicles; 2) the location and types of telephones or radios for summoning emergency assistance and specific instructions for their usage; 3) detailed procedures for avoiding and responding to spills of liquid and solid materials, including specific information discussed below; 4) preparation and response procedures for fires, including specific information discussed below; and 5) the timing and content of training to be provided to persons before their participating in the collection of wastes. The commission proposes that the detailed discussion of procedures for avoiding and responding to spills of liquid and solid materials must include at least the following information: 1) who will respond to

different sizes and types of spills (including on-site staff, emergency responders, contractors, etc.); 2) detailed methods to be used for avoiding, controlling, and cleaning up spills; 3) decontamination procedures for people and equipment; 4) processing or disposal of contaminated materials and other wastes from the spill response; 5) the types of engineering controls and personal protective equipment available on site and procedures for proper selection and use during spill responses; 6) types and location of equipment and materials available on site; 7) the duties of specific personnel; 8) evacuation procedures (including at least the collection site and, if appropriate, the surrounding area); and 9) procedures for reporting spills to local, state, and federal authorities. The discussion of preparation and response procedures for fires would include at least the following information: 1) the location and types of fire extinguishers and other fire suppression equipment available on site; 2) when on-site fire equipment would be used and when the fire department would be summoned; 3) evacuation procedures (including at least the collection site and, if appropriate, the surrounding area); 4) the identity and storage location of any materials to be collected that might need special fire-fighting methods (such as flammable liquids and metals, explosives, compressed gases and aerosol cans, water reactive materials, etc.); the availability of a local fire department and whether they can handle the maximum fire potential from the anticipated collection on their own or through established mutual aid response arrangements.

The health and safety plan would cover the timing and content of training or briefings on safety for staff and volunteers before they participate in collecting wastes. The content of this training would be specific to the duties to be performed.

In new §335.405(b), the commission proposes that the operational plan must be available at the collection event or permanent collection center covered by the plan and at the offices of the entity operating the collection program. The operational plan is to be used for training staff, planning, and conducting collections. The operational plan is to be maintained for as long as collection events are planned and for at least one year after a collection event, after a permanent facility closes, or after other types of HHW activities cease. The commission proposes that the operational plan must be provided to the executive director upon request in lieu of the current requirement that all operational plans be submitted to the commission before collections.

§335.407. *Training Requirements.*

The commission proposes new §335.407 to cover training requirements for persons involved with HHW collections and reuse operations. The section would cover the general types and the timing of training.

The commission proposes new §335.407(a) to specify that the operator is responsible for ensuring that training appropriate to their duties is provided to all individuals involved in any waste collection, that the training is specific to the HHW operations being conducted, and that training is provided to all individuals involved with the collection, aggregation, storage, and transport of HHW and with offering materials for reuse. The training would be specified as any appropriate combination of training courses as well as the operational plan for program-specific training.

New §335.407(b) would require operators to ensure that training is provided before individuals collect, aggregate, store, or transport HHW for reuse, recycling, processing, or disposal. Operators would be required to ensure that all training requirements are met for individuals performing specific job duties. Operators would be required to ensure that volunteers are appropriately trained on the site rules and safety issues before assisting with a collection.

In new §335.407(c), the commission proposes that the training must cover any applicable training requirements in federal and state laws and regulations, including federal Occupational Safety and Health Administration requirements related to handling hazardous materials, responding to spills, and other activities, the Texas Hazard Communication Act, U.S. Department of Transportation requirements for preparing and packaging wastes for transportation, and EPA rules for training of personnel at hazardous waste facilities. New §335.407(d) would require that operators ensure that individuals are trained under this chapter as if HHW were hazardous waste, such as using Hazardous Waste Operations and Emergency Response (HAZWOPER) courses although they apply to hazardous waste rather than HHW.

§335.409. *Operation of Collection Events and Permanent Collection Centers.*

The commission proposes new §335.409 to specify operational requirements for permanent collection centers and collection events. Most current requirements would be retained, in some cases with changes or rewording, but reordered to reflect the order in which actions would generally occur.

New §335.409(a) would retain the current requirement for operators to site, organize, and operate collections in a manner that protects the environment and safeguards human health, welfare, and physical property. The current requirement would be retained that operators select locations suitable for the types and quantities of wastes to be collected. Because of the risks associated with incompatible chemicals being in close proximity and with public exposure or environmental impacts if wastes are packaged in an uncontrolled area, the current requirement that wastes be sorted upon receipt and placed into a controlled waste packaging area whenever possible would be changed to make these requirements mandatory for all collection events and permanent facilities by removing the wording "whenever possible" - only sites that do allow safe handling and processing of wastes upon receipt could be selected. The current requirement would be retained that operators provide a controlled access area for sorting, packaging, and handling wastes accepted. The commission proposes augmenting the current requirement that operators provide parking by clarifying that queuing of vehicles waiting to unload must be done so as to not interfere with safe entry or exit of vehicles and to prevent traffic congestion. The current requirement that operators prepare for inclement weather would be retained with a specification that the preparation include provisions for sheltering personnel at or near the site during storms. The current requirement would be retained that operators must designate areas for eating, drinking, and smoking and prohibit these activities in collection work areas. The commission proposes changing the current requirement that incompatible and unidentified wastes be segregated prior to packaging for transport or storage to also require segregation after packaging.

In new §335.409(b), the commission proposes provisions for personnel and training. The current requirement that personnel at HHW facilities be familiar with the operational plan is proposed to be changed to require that the operator ensure that personnel are trained to use and follow the operational plan.

The current provision requiring that at least one person involved in handling and packaging waste be trained and knowledgeable of waste incompatibility and qualified to package waste for trans-

port is proposed to be changed. The revised provision would require that the operator ensure that all persons involved in these activities and those overseeing and supervising the activities on site be trained and knowledgeable of HHW incompatibility and qualified to package hazardous waste for transport. In order to ensure that waste is properly packaged and to avoid reactions of incompatible wastes, the persons with direct control over these activities while in progress need to have the requisite knowledge. Because the pertinent U.S. Department of Transportation regulations (at 49 CFR §171.3) cover hazardous waste not HHW, although the materials are the same, the qualification for packaging hazardous wastes is the appropriate training for persons handling and packaging HHW.

The commission proposes to retain, as a responsibility of the operator, the requirement that at least one person who is trained to classify hazardous waste be utilized to accept or supervise the acceptance of waste at each HHW facility. The commission proposes expanding the current requirement that personnel be instructed in accident prevention, responses to fires, explosions, and spills, and the use of protective devices to minimize exposure to HHW to include other materials accepted during the collection activities that also present exposure risks and proper fire extinguisher training, and to make it the responsibility of the operator to ensure this requirement is met. There are types of household wastes that do not have the characteristics of hazardous waste (and are therefore not HHW) but that can present significant exposure risks. The current requirement that labeling and packaging of HHW waste be supervised by a person familiar with U.S. Department of Transportation hazardous materials shipping and hazardous waste manifest requirements is proposed to be retained as a responsibility of the operator.

The commission proposes to expand, as a responsibility of the operator, the current requirement that at least one person be on site who is trained to perform general first aid and who is knowledgeable concerning safety measures used for chemical exposures. The new requirement would expand the requirement to any hazardous material presented for collection (rather than only HHW) and would specify that the first aid training must be consistent with courses provided under the auspices of a recognized national safety organization and documented with a current certificate. First aid practices improve over time and retraining reinforces this knowledge, so it is important that the first responders keep their training current. Because national safety organizations that certify first aid training ensure that the training is complete, thorough, and up-to-date, these courses will provide the necessary skills for general first aid responders. The new provision would specify that a person trained on these issues must be on site whenever wastes are being handled.

The current provision would be retained, as a responsibility of the operator, that an on-site supervisor must be available and responsible for initiating an emergency response plan, for accepting any unidentified wastes, and for ensuring proper handling and processing or disposal. The commission proposes to retain, as a new responsibility of the operator, the provision that the on-site supervisor must have the authority to remove from the site and prohibit the re-entry of any person who may threaten site security or personal safety.

The current requirement that a HHW operation must be manned by an adequate number of staff with the necessary skills and expertise to accept, sort, package, transport, and manifest the waste and to provide on-site supervision and public relations would be made a responsibility of the operator and modified by dropping package, transport and manifest and by adding label and store. The commission proposes this change to allow flexibility in operations because in some cases wastes are not prepared for shipment at the time of collection but are stored until a registered transporter comes to prepare and ship them from the facility, often at times when collections are not occurring. The commission proposes a new provision that operators ensure that an adequate number of operator or contractor staff with the necessary skills and expertise to package, transport and manifest hazardous materials be present and involved when wastes are prepared for transportation.

The commission proposes to add a requirement that an operator must ensure that personnel who handle HHW or who supervise these activities must have certification through attending a HAZWOPER course appropriate to their duties and annual refresher training. The commission also proposes that, if the HAZWOPER course covers other training required by this subchapter but not by the HAZWOPER regulation from the federal Occupational Safety and Health Administration, this fact must be documented on the certificate for the HAZWOPER course or on a separate certificate.

In new §335.409(c), the commission proposes to modify the existing requirements for having equipment and materials present at collection events and permanent collection centers. The current requirement that materials and equipment to provide protection, safety, and first aid for staff, to contain and clean up spills, and to properly handle, classify, and label the waste would be specified as responsibilities of the operator because operators must ensure that collections are conducted properly and safely. Additionally, because wastes are not always packaged during collections, as discussed previously, the requirement that materials to package waste must be present would be changed to materials for storing wastes. Because materials other than HHW may be collected and spilled and to provide clarity for whom is responsible, the current provision that disposable cleanup materials and protective clothing used during a spill cleanup be handled as HHW would be changed to a responsibility of the operator to ensure that these materials are handled as the type of material that was spilled.

The current requirement that nondisposable equipment and materials that are used and contaminated in a spill response be decontaminated before removal from the site would be changed to a responsibility of the operator to ensure that items are properly decontaminated before removal from the site, regardless of the cause of the contamination. The changes here would specify who is responsible for the action and would also extend the requirement to any nondisposable equipment or material that becomes contaminated, regardless of how this occurs. The risk of spread of contamination is not limited to spills, and equipment or materials that become contaminated during normal use or in other ways need to be decontaminated as well.

The commission proposes to specify that the provision of equipment at collection events and permanent collection centers is the responsibility of the operator. The current list of equipment would be retained with some changes. Because this section addresses collection events and permanent collection centers, the requirement for a first aid kit for a point of generation pick-up service vehicle would be moved to new §335.411(a)(4)(A). The current requirement for a means of communication for emergencies specifies a telephone or citizen's band radio; this requirement would be changed to a telephone or any type of radio because some collections have radios used by police or fire de-

partments on site rather than citizen's band radios. The current requirement that an eyewash, shower station, or hosing device be available would be changed to an eyewash and shower station or a hosing device; an eyewash is not designed to wash contamination from other parts of a body and a shower station is not effective for washing the eyes, but a hosing device could be used for either purpose. The current requirement for a fire extinguisher would be amended to require at least two fire extinguishers that are appropriate to the types of wastes accepted. Because a chemical fire could limit access to a single fire extinguisher, having two on site provides an additional margin of safety. The current requirement for sufficient absorbent or containment to handle a spill of ten percent of the anticipated volume of liquid waste would be retained, and the applicability of this provision to point of generation pick-up service vehicles would be moved to §335.411(a)(4)(D) with changes as discussed later for that section.

In §335.409(d) the commission proposes to retain with changes the current provisions for wastes accepted and excluded. The recommendation that only household wastes be collected would be retained intact. The prohibition on accepting hazardous waste and Class 1 waste would be retained with a correction to the term "Class 1 waste" (i.e., dropping "industrial") to be consistent with §335.1(18). The current provision that unidentified waste be identified by a chemist or trained individual would be made a responsibility for the operator to ensure that this action occurs prior to transportation of the waste, and language would be added to specify that any physical assessment must be done by qualified individuals.

The commission proposes to remove the current requirement that announcements and promotional material must state that compressed gas or explosives cannot be brought to a collection event or permanent collection center but that these materials should be taken if brought and appropriate authorities immediately contacted. Instead, the commission proposes that the announcement and promotional material be required to state which types of waste will be accepted and which will not. The operator would be required to provide information to potential participants before a collection event or the opening of a permanent collection center and at least annually thereafter for the period that the permanent collection center is open. The commission proposes that the information must include all relevant information on the following: 1) the types and quantities of wastes that will be accepted and that will not be accepted; 2) the instructions for the public to safely package and transport the wastes to the collection; 3) the days and hours of operation and the location of the site; and 4) who can bring wastes to the collection, as well as any other information that may be useful to the public. Because some collection programs have made special arrangements to handle compressed gases or explosives, it is counterproductive to require that the public be told not to bring these materials. The issues related to safely transporting the materials could be covered through public outreach rather than a stated but un-enforced ban on the materials. The new types of information that would be required for the outreach materials and advertisements provide greater protection to the public and facilitate participation in the collections.

The current requirement concerning decisions on accepting certain wastes would be made a responsibility of the operator to ensure that these decisions are based on the capabilities of the personnel collecting, sorting, and packaging the waste. The current requirements would be retained that the operational plan include a generic list of proposed wastes to be accepted and that this list be developed with the intent of minimizing the need to analyze unknown wastes, but the phrase "unidentifiable wastes" would be changed to "unidentified wastes" because any material can be identified if analyzed properly.

The current requirement that empty HHW and pesticide containers can be disposed as nonhazardous waste if rendered unusable would be retained. The current requirement that there be a container at the collection for nonhazardous wastes would be deleted because some collection programs do not accept nonhazardous wastes. Any collection program that accepts wastes other than HHW is still required to comply with other laws and regulations pertinent to the other types of wastes that are collected, including storage and disposal.

In new §335.409(e), the commission proposes to retain the requirements for temporary storage with some changes. The current requirements are modified to provide that the operator is responsible for storage being operated safely and for a facility being secured to control access by the public.

The current rules have permissible periods of storage based on amounts of wastes on site, but neither the periods or amounts correspond with those for hazardous waste storage in §335.69. The reasons for these differences are not clear because HHW has the same characteristics as hazardous waste. The commission is not proposing to make the provisions for HHW consistent with those for hazardous waste at this time, but the commission is specifically requesting comment on this issue to evaluate whether changes should be made in future rulemaking.

The commission proposes to retain the following provisions for storage of HHW: 1) HHW can be stored for 10 days if more than 3,000 kilograms are aggregated; 2) storage at an authorized hazardous waste processing, storage, or disposal facility is not limited by Subchapter N; 3) the commission may extend the ten-day period if a written request is received; and 4) HHW can be stored for 180 days if 3,000 kilograms or less are aggregated. The current provisions would be changed in the following ways: 1) to specify that extensions would be requested of and provided by the executive director (or his designee); 2) to add that the written requests for extension must include the reason that waste must be stored longer than ten days, the earliest date that a waste in storage was received, and the expected date that the wastes will be transported to a recycling facility or a hazardous waste processing, storage, or disposal facility; and 3) to specify that the 180-day storage period only applies to permanent collection centers rather than recurring collection programs.

The commission proposes to change the current labeling requirements for HHW in storage. The current provisions appear to be based on labeling requirements for consumer products rather than for hazardous materials in transportation from the U.S. Department of Transportation. Although simpler than labeling requirements for consumer products, the hazardous materials in transportation provisions would provide sufficient information for safe storage of HHW and would not require additional labeling for HHW stored in shipping containers that are properly labeled for transport. The labels on consumer products also provide sufficient information for safe storage. Therefore, the commission proposes to require that operators ensure the following for HHW stored in the individual containers received by the public (as opposed to materials in proper shipping containers with required labeling): 1) intact, legible, and correct labels are maintained on the individual containers with such labels (i.e., labels could not be removed, defaced, or changed); 2) if labels are missing, defaced, or incorrect on containers stored individually, as a min-

imum, information required by the hazardous materials in transportation regulations is marked on each container; and 3) the date received from the public is marked on any container stored individually. Further, if HHW is properly prepared for transportation and stored in properly labeled shipping containers, the commission proposes that the marking of individual containers received from the public is not required. The commission proposes to retain the current one-year recordkeeping provision for HHW that is collected, but to make the retention the responsibility of the operator.

§335.411. *Operation of Point of Generation Pick-up service and Mobile Collection Units.*

The commission proposes new §335.411 to specify operational requirements for point of generation pick-up services and mobile collection units. These types of collections receive HHW from the public and then usually transport the HHW to a receiving facility. Point of generation pick-up services go to households and take the wastes via direct contact with the residents or take wastes that have been left at curbside or in another prearranged location. Mobile collection units set up in a convenient location and then function similar to a collection event or permanent collection center with the public delivering the wastes to the site.

The commission proposes to provide in §335.411(a) the requirements for point of generation pick-up services. Because leaving HHW unattended outdoors for pickup presents potential hazards from spills, rain runoff, and contact by animals and children, the commission proposes to retain the requirements that operators utilizing point of generation pick-up services develop and implement a collection program that minimizes human and animal exposure to collected waste and is protective of human health and the environment and that, when the collector will not directly contact the generator of the HHW, operators be required to provide instructions to the public for properly packaging, labeling, and securing the waste. The commission proposes to change the current requirement to specify for clarity that the procedures provided to the public are to be specific to the wastes left out for pickup. The commission proposes to remove the specification that the requirements for these programs also apply to collectors. Because operators are in charge of the programs, collectors affiliated with the programs are under the operators' control. The commission does not intend that these provisions should apply to citizens delivering HHW from friends, relatives, neighbors, or others, so the current application of the provisions to collectors is not needed.

To ensure that the public has sufficient information to participate safely and effectively, the commission proposes requiring operators of point of generation pick-up services to disseminate prior to collection activities information to potential participants detailing the following: 1) instructions for properly packaging, labeling, and securing the waste if it will not be personally transferred by the generator to the collector; 2) eligibility criteria for participating in the program; 3) the types and quantities of wastes that will be accepted and will not be accepted; and 4) methods to be used for arranging pickup. The proposal includes a requirement that operators of point of generation pick-up services organize and operate collections so as to safeguard health, welfare, and physical property and to protect the environment.

To ensure safety in operations, the commission proposes requiring that operators ensure that each vehicle is equipped with a first aid kit, an appropriate fire extinguisher, a method of communicating with emergency first responders and information needed for its use (such as instructions, emergency telephone numbers, radio frequencies for specific types of emergencies, etc.), and enough spill absorbent to clean up a spill of ten percent of the maximum quantity of liquid waste the vehicle is designed to hold. The proposal also requires that vehicles used for point of generation pick-up service be staffed by at least one person experienced in and trained in hazardous waste handling, fire extinguisher use, first aid, waste classification, waste incompatibility, spill prevention, and clean-up safety.

Operators of point of generation pick-up services that will accept unknown wastes would be required to ensure that unknown wastes are properly identified and either to have available on the collection vehicle all testing equipment needed to identify wastes prior to placement on the vehicle and a person qualified to use the equipment, or to have a way of separately isolating on the vehicle each container of unknown waste until delivery to a permanent collection center or collection event where the wastes will be identified prior to being aggregated with other wastes, as long as this is consistent with U.S. Department of Transportation regulations for hazardous materials in transportation. Because the federal rules apply to shipments larger than 1,000 kilograms and do not allow the shipment of unknown materials because of potential incompatibility issues, the second option is not available in all cases.

Because the operation of mobile collection units is similar to either a permanent collection center or a collection event depending on how long wastes are stored at the site where the collection is held, the commission proposes requiring operators utilizing mobile collection units to comply with the requirements in §335.409, as discussed previously, for the sites where collections are held. Because mobile collection units can be used to collect, store, and haul HHW, the proposal also requires that these operators develop and implement a collection program that minimizes the potential for human exposure to or environmental harm from collected waste during collection, storage, and transport. The commission proposes requiring that operators using mobile collection units staff each mobile collection unit with at least one person experienced in and trained in hazardous waste handling, fire extinguisher use, first aid, waste classification, waste incompatibility, spill prevention, and clean-up safety. The proposal requires that mobile collection units be equipped with the following: 1) a first aid kit, 2) an appropriate fire extinguisher, 3) an eye wash and emergency shower or a hosing device, 4) a means of summoning emergency assistance, and 5) enough spill absorbent and containment to handle a spill of ten percent of all liquid waste on the unit.

Operators of mobile collection units that will accept unknown wastes would be required to ensure that unknown wastes are properly identified and either to have available on the mobile collection unit all testing equipment needed to identify wastes prior to placement on the vehicle and a person qualified to use the equipment, or to have a way of separately isolating on the unit each container of unknown waste until delivery to a permanent collection center or collection event where the wastes will be identified prior to being aggregated with other wastes, as long as this is consistent with U.S. Department of Transportation regulations for hazardous materials in transportation. Because the federal rules apply to shipments larger than 1,000 kilograms and do not allow the shipment of unknown materials because of potential incompatibility issues, the second option is not available in all cases. The commission proposes that operators must register as a transporter to use a mobile collection unit to transport HHW to a processing, storage, or disposal facility, except for HHW that is properly shipped as universal waste.

The commission proposes requiring operators utilizing point of generation pick-up services and mobile collection units to comply with personnel and training requirements found in proposed §335.409(b), with proposed wastes acceptance and exclusion parameters found in proposed §335.409(d), and with temporary storage requirements found in proposed §335.409(e). The requirements for training staff, accepting and excluding wastes, and temporary storage are all equally pertinent to mobile collection units and point of generation pick-up services as to collection events and permanent collection centers.

In order to provide flexibility on how the programs operate, there are no specific proposed requirements for secure long term storage on the vehicles or for manifesting collected HHW. Therefore, the commission proposes requiring that within 24 hours of collection that HHW collected by a point of generation pick-up service or mobile collection unit be delivered to a permanent collection center to be aggregated with other HHW or be transported to a hazardous waste processing, treatment, and disposal facility by a transporter compliant with the requirements of §335.415. The current requirement allowing collection vehicles to take waste directly to a hazardous waste processing, storage, or disposal facility would be deleted to avoid the risks of long-distance transport of the more hazardous types of HHW by unregistered transporters. If operators wish to transport HHW that cannot be classified as universal waste directly to processing, storage, or disposal facilities, they have the option to register as transporters.

§335.413. *General Shipping, Manifesting, Recordkeeping, and Reporting Requirements.*

The commission proposes new §335.413 to specify shipping, manifesting, recordkeeping, and reporting requirements for persons who collect, receive, or aggregate HHW. The proposal retains the provisions but use clearer language to state that this section applies to materials collected except for materials to be offered for reuse and to wastes that are not HHW. The commission proposes to retain the requirement that persons who collect, receive, or aggregate HHW must use only hazardous waste transporters who have notified the executive director and the EPA of their hazardous waste activities and who have been issued an EPA identification number, except for HHW that can be shipped as universal waste by non-registered transporters. The proposal specifies this requirement applies to HHW from collection events and permanent collection centers because there are provisions for point of generation pick-up services and mobile collection units to transport HHW to collection events and permanent collection centers without being registered transporters, as discussed previously.

The commission proposes retaining, but in clearer language, the requirement that collectors and operators transport and ship HHW from a collection center or a collection event using a uniform hazardous waste manifest or following the universal waste rules (if appropriate to the type of waste being shipped) only to a permitted hazardous waste processing, storage, or disposal facility authorized to accept HHW that has agreed in advance to accept the waste. The proposal would specify this part as applying to HHW from collection events and permanent collection centers because there are provisions for point of generation pick-up services and mobile collection units to transport HHW to collection events and permanent collection centers without using manifests, as discussed previously. As discussed previously, point of generation pick-up service vehicles and mobile collection units would be prohibited from transporting HHW to hazardous waste facilities unless they are registered as transporters.

The commission proposes to clarify the requirement that persons who collect, receive, or aggregate HHW ensure that the HHW is packaged and labeled in compliance with §335.10 and U.S. Department of Transportation requirements by adding language that the other regulations are to be applied as if the HHW was hazardous waste. The commission proposes requiring persons to make available to the executive director upon request, and to retain for one year, all hazardous waste manifests and bills of lading (for universal waste shipments) for HHW shipments.

The commission proposes requiring operators to submit an annual report on all wastes collected and materials offered for reuse. The report would be due each February 1st for the previous calendar year on a form provided by the commission. The commission proposes requiring collectors and operators to ensure that all wastes are processed or disposed of in compliance with federal, state, and local laws and regulations. This provision would also state that any materials that are sent for processing or disposal after being offered for reuse need to be processed or disposed of as HHW if they would be hazardous waste except for the federal exclusion for household waste.

§335.415. *General Requirements for Transporters.*

The commission proposes new §335.415 to specify conditions for persons who transport HHW that is required to be accompanied by a universal hazardous waste manifest. The proposal retains the provision that HHW that is required to be accompanied by a universal hazardous waste manifest can be transported only by transporters who have notified the executive director and the EPA and obtained an EPA identification number. The current provisions requiring transporters to comply with §§335.4(1) - (3), 335.11, and 335.14 would be modified to state that transporters must apply those requirements to HHW as if it was hazardous waste.

The commission proposes rewording for clarity the current requirements for transporters who conduct HHW collections. The amended requirements would state that transporters operating a HHW collection program must comply with the applicable requirements for operators. The provision that transporters must keep HHW separate from hazardous waste or Class 1 waste would be retained but reworded for clarity and brevity.

§335.417. *General Requirements for Processing, Storage, or Disposal Facilities.*

The commission proposes new §335.417 to specify the requirements for hazardous waste processing, storage, or disposal facilities. Wording would be added to §335.417(a) to clarify that only hazardous waste facilities with a permit authorizing the receipt of HHW are allowed to receive HHW shipped under a uniform hazardous waste manifest or as universal waste. The rule would require that hazardous waste facilities receiving HHW comply with their permit.

The current requirements with which hazardous waste processing, storage, or disposal facilities must comply in order to receive HHW directly from the public would be deleted. As discussed previously, the permitting process for these facilities provides sufficient oversight of their handling HHW. The commission proposes adding a new requirement that hazardous waste processing, storage, or disposal facilities receiving HHW directly from the public must report to the executive director on the quantities received using the same process as any other HHW program. This change would provide more complete information for the commission's required reports on wastes collected.

§335.419. *Reuse of Collected Material.*

The commission proposes new §335.419 to specify that collected materials that may be reused do not have to be managed as HHW unless they are sent for processing or disposal. The section would retain the current criteria for which materials are reusable. The entities to whom reusable materials can be given would be expanded to any individual or group by replacing the current wording "a governmental entity, institution, or other responsible party" with the word "person" which is defined in Chapter 3 as any individual or legal entity. The commission does not see any reason to restrict who can receive materials that are in useable condition.

The commission proposes adding language to specify that storage of materials to be offered for reuse is not subject to the requirements of this chapter. Such materials are products rather than waste, and therefore are not HHW. The commission intends that this clarification increases the amount of materials that HHW programs make available for reuse because this option for dealing with received materials is by far the most environmentally and economically beneficial way to handle the materials. Additionally, language would be added to clarify that, if any material in usable condition not accepted by another party is sent for processing or disposal by the HHW program, it must be processed or disposed as HHW under the provisions of this subchapter if it is HHW. This provision is consistent with the federal exclusion for wastes from households from classification as hazardous waste (at 40 CFR §261.4(b)(1)).

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules. Participation in HHW collection programs is voluntary. Local governments and other state agencies that have HHW programs should not experience a significant increase or decrease in costs as a result of the proposed rules.

The proposed rules would revise current standards for HHW collection programs to: reduce the time limit for collection notification to be sent to the agency from the current 90 days to 45 days; eliminate the need to submit an operational plan to the agency unless requested to do so; move information required by the agency from an operational plan to the collection notification; specify requirements for the use of mobile collection units which are not addressed under current rules; make operational plans more specific to the types of HHW collections so that they serve as more useful reference documents during collections; formalize an annual reporting requirement on the amount of HHW collected so that more complete reporting information is available to the agency; and update rules to reflect the current name of the agency.

The establishment of HHW collection programs is voluntary in nature. Local governments and state agencies that have established these types of programs already incur costs to collect the waste and transport them to hazardous waste facilities for processing or disposal. The proposed rules, which are chiefly administrative in nature, are not expected to generate significant cost savings or increases for these volunteer participants. Staff estimates that there may be as many as 80 active local governments involved with HHW collections. The requirement for record retention over a longer length of time may increase record retention costs, but eliminating the submission of operational plans to the agency unless requested may reduce postage costs. Because the proposed rules would also clarify the requirements for operational plans, plan preparation may be easier, and the plans may be more useful as reference material and training documents. Any cost increases or savings are expected to be insignificant and would vary widely among governmental entities depending on the operations and costs of each different local government and the manner in which they conduct HHW collections.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be greater clarity in the requirements for HHW collections which may encourage the availability of such programs and promote reuse, recycling, and better processing or disposal of HHW.

Businesses involved in any aspect of HHW collection programs must comply with the requirements of the proposed rules. Such businesses may run collections or may be contracted to handle HHW during or after collections. Staff estimates that there may be as many as seven hazardous waste firms that are currently involved in HHW collections as contractors, and at least one business runs a permanent HHW collection center. The proposed rules are not expected to have a significant impact on cost increases or savings for these businesses. Businesses should experience the same cost impacts as local governments. Any fiscal impact will depend on the business entity and its business practices.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses. It is not known how many small or micro-businesses are involved with HHW collection programs. If a small or micro-business is involved in HHW collection programs, the proposed rules should not have any significant fiscal implications for it.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS

The commission reviewed the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of

the state or a sector of the state. The proposed amendments to Chapter 335 are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, because there are no significant requirements added to HHW collection activities. HHW collection activities are voluntary. The proposed rulemaking action reorganizes and rewords existing requirements for HHW collection activities, streamlines the application requirements, and addresses new methods and techniques for HHW collection. The proposed rules make appropriate formatting changes, clarifications, and updates to the rules to reflect requirements of the Secretary of State for rule publication.

Furthermore, the proposed rulemaking action does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The proposed rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

Federal rules in 40 CFR §261.4(b) specifically exclude HHW from the definition of hazardous waste. Thus, HHW and the commission's proposed requirements for the management of HHW are not subject to federal standards for the management of hazardous waste.

The Texas Health and Safety Code, §361.029, specifically authorizes the commission to develop rules for the collection of HHW. The commission proposes these rules consistent with this statutory authority and does not propose to exceed an express requirement of state law.

The proposed rules do not exceed a requirement of a delegation agreement or contract between the state and an agency of the federal government because there is not an applicable delegation agreement or contract with the federal government related to these activities. Because HHW is excluded from the definition and regulatory requirements for hazardous waste, the proposed revisions to the HHW program do not exceed a requirement of the state's authorized hazardous waste program.

The commission does not propose these rules solely under the general powers of the agency. Rather, the commission proposes these rules under Texas Health and Safety Code, §361.029 and §361.429, which authorize the commission to develop rules for the collection of HHW. The commission invites public comment of the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated rulemaking action and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because these proposed rules implement requirements for the safe and effective management of HHW. The proposed rulemaking is reasonably taken in response to a real and substantial threat to public health and safety, is designed to significantly advance the health and safety purpose, and does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, the proposed rulemaking is exempt under Texas Government Code, §2007.003(b)(13).

Nevertheless, the commission further evaluated these proposed rules and performed a preliminary assessment of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The purpose of these proposed rules is to implement changes to the requirements for the collection of HHW. The proposed rules would substantially advance this purpose by reorganizing and rewording existing requirements, streamlining the application requirements, and addressing new methods and techniques for HHW collection.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. The proposed rules do not affect a landowner's rights in private real property because this rulemaking action does not burden (constitutionally), nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations. The proposed rules implement a voluntary program for HHW collection. The proposed rules do not substantially change the existing technical requirements that were in place under the previous rules. Therefore, the commission's proposed rules do not affect real property in a manner that is different than may have been affected under the previous requirements.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal on March 11, 2008, at 10:00 AM in Austin at the commission's central office located at 12100 Park 35 Circle in Room 2210 of Building F. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact John Gaete, Office of Legal Services at (512) 239-6091. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to John Gaete, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2007-005-335-AD. The comment period closes March 17, 2008. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Joseph Thomas, Pollution Prevention and Education Section at (512) 239-0012.

SUBCHAPTER N. HOUSEHOLD MATERIALS WHICH COULD BE CLASSIFIED AS HAZARDOUS WASTES

30 TAC §§335.401 - 335.403, 335.405 - 335.412

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Environmental Quality or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeals are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The repeals are also proposed under Texas Health and Safety Code, Chapter 361, concerning Solid Waste Disposal Act.

The proposed repeals implement Texas Health and Safety Code, Chapter 361.

§335.401. Purpose.

§335.402. Definitions.

§335.403. Authority.

§335.405. Applicability.

§335.406. General Requirements for Collectors and Operators.

§335.407. Operation of Collection Centers.

§335.408. Household Pick-up.

§335.409. General Shipping, Manifesting, Recordkeeping, and Reporting Requirements.

§335.410. Reuse of Collected Material.

§335.411. General Requirements for Transporters.

§335.412. General Requirements for Processing, Storage, or Disposal Facilities.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800620
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 239-6091

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SUBCHAPTER N. HOUSEHOLD HAZARDOUS WASTE

30 TAC §§335.401 - 335.403, 335.405, 335.407, 335.409, 335.411, 335.413, 335.415, 335.417, 335.419

STATUTORY AUTHORITY

The new rules are proposed under Texas Water Code, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the Texas Water Code and other laws of this state; under Texas Health and Safety Code, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the Texas Health and Safety Code; under Texas Health and Safety Code, §361.029, which requires the commission to provide rules for persons to engage in activities that involve the collection and disposal of HHW; and under Texas Health and Safety Code, §361.429, which requires the commission to establish standards for HHW collection programs.

The proposed new rules implement Texas Health and Safety Code, Chapter 361.

§335.401. Purpose and Applicability.

(a) The purpose of this subchapter is to provide requirements for persons who are involved in any combination of collecting, aggregating, offering for reuse, recycling, transporting, or disposing of household hazardous wastes and other types of household waste materials that may, due to their quantity and characteristics, pose a potential endangerment to human health or the environment if improperly handled.

(b) The requirements of this subchapter apply to persons who engage in any combination of the following activities:

(1) collect, aggregate, or store household hazardous waste for offering for reuse, recycling, processing, or disposal;

(2) provide a point of generation pick-up service;

(3) operate a mobile collection unit;

(4) operate a collection event;

(5) operate a permanent collection center;

(6) transport any aggregated household hazardous waste; and

(7) own or manage a hazardous waste processing, storage or disposal facility that receives household hazardous waste directly from the public or households.

(c) The requirements of this subchapter do not apply to:

(1) persons who receive from households for the purpose of reuse, recycling or reclamation any combination of used oil, batteries, and paint, provided such persons do not collect other household hazardous waste or other household wastes under the requirements of this subchapter;

(2) persons who collect less than 100 pounds of household hazardous waste per year;

(3) retailers who accept from the public only waste items that are of the same type(s) as products sold by the retailer;

(4) collection events organized primarily for the purpose of collecting for processing or disposal pesticides and other wastes from agricultural operations and incidental amounts of household hazardous wastes, if no fees are charged for the collection and if registered transporters are used to haul the collected wastes to hazardous waste processing, storage, or disposal facilities; or

(5) organizations that collect used electronic equipment from the public for reuse, provided such individuals do not make a determination during the collection of whether the electronics are wastes, do not handle the electronics in a manner that renders them useless, and do not collect household hazardous waste or other household wastes covered under the requirements of this subchapter.

(d) Any provisions of this subchapter may be waived by the executive director for emergencies, disasters, or in other circumstances where flexibility from the requirements is necessary to protect public health and the environment.

§335.402. Definitions.

In addition to the definitions in §3.2 of this title (relating to Definitions) and §335.1 of this title (relating to Definitions), the following words and terms, when used in this subchapter, have the following meanings:

(1) Aggregate--The act of bringing together household hazardous waste that, after being separated from other household waste, is collected from two or more households and accumulated at a collection event, permanent collection center, point of generation pick-up service, mobile collection unit, or transporter's facility for the purpose of reusing, recycling, or disposing the material.

(2) Collection event--A one-time or recurrent designation of a site and areas within that site for use by an operator to collect or aggregate household hazardous waste delivered to the site by individuals, households, or collectors and to store the waste for less than 24 hours.

(3) Collector--Any person who accepts from two or more households any waste materials that have been separated from other household waste and offered to the collector because the generator either knows or considers the materials to be household hazardous waste. This term includes persons involved with household hazardous waste collection programs, but does not include persons delivering wastes that have not been aggregated to a collection program with which they are not affiliated.

(4) Hazardous waste processing, storage, or disposal facility--A hazardous waste processing, storage, or disposal facility that has received an United States Environmental Protection Agency (EPA) permit (or a facility with interim status) in accordance with the requirements of 40 Code of Federal Regulations (CFR) Parts 270 and 124, or that has received a permit from a state authorized in accordance with 40 CFR Part 271.

(5) Household--Single and multiple residences, hotels and motels, bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds, and day-use recreational areas.

(6) Household hazardous waste--Any solid waste generated in a household by a consumer which, except for the exclusion provided in 40 Code of Federal Regulations (CFR) §261.4(b)(1), would be classified as a hazardous waste under 40 CFR Part 261. The term has the same meaning as "hazardous household waste."

(7) Inclement weather--Weather that could present a hazard in the operation of a collection event, permanent collection center, mobile collection unit, or point of generation pick-up service, including temperature extremes, high winds, rain, and severe weather.

(8) Mobile collection unit--A vehicle (such as a truck or trailer) that is used to aggregate household waste materials delivered by the public prior to transporting the material to a permanent collection center, collection event, or registered hazardous waste transporter facility.

(9) Operator--A person responsible for the collection, aggregation, and storage of household hazardous waste and household materials at a collection event or permanent collection center, in a point of generation pick-up service or mobile collection unit, or in any combination of collection programs; or, if the context clearly refers to an operator of a hazardous waste processing, storage, or disposal facility, the term has the same meaning as defined in §335.1 of this title.

(10) Permanent collection center--A designated site and facilities used to collect and aggregate household hazardous wastes on an ongoing basis and to store the wastes for 24 hours or longer.

(11) Personnel--All individuals who perform tasks at or oversee the operations of a collection event, permanent collection center, mobile collection unit, or point of generation pick-up service, and whose actions or failure to act may result in noncompliance with the requirements of this subchapter.

(12) Point of generation pick-up service--A service to collect household hazardous waste at generating households, either through direct contact with the generators or by collection of household hazardous waste left at curbside or in another location at the household.

§335.403. General Requirements for Household Hazardous Waste Collections.

(a) Except as provided in subsection (e) of this section, no person may collect or aggregate household hazardous waste that has been segregated from other solid waste, provide point of generation pick-up service, operate a mobile collection unit, operate a collection event, or operate a permanent collection center without having first submitted a current notification to the executive director, in accordance with subsection (b) of this section.

(b) On a form provided by the commission, an operator shall submit an original and signed notification to the executive director at least 45 days prior to conducting activities covered by this subchapter. For on-going collection programs, such as multiple collection events at a single location, point of generation pick-up services, and permanent collection centers, the notification must be resubmitted whenever the information provided in the notification changes. For multiple collection events and mobile collection units, each location where a collection will be held must be covered in a separate notification, but multiple collections at one location can be covered by a single notification if the same information other than dates applies to each collection. The notification must include the following information:

(1) name and address of the operator;

(2) name, address, and telephone number of an individual to be the contact person for the operator;

(3) date(s) and times of the planned collection(s) or days and hours of operation of a permanent collection center, point of generation pick-up service, or mobile collection unit(s);

(4) for a collection event, permanent collection center or mobile collection unit, the address of the collection site and the part of the site that will be used for collections;

(5) for a point of generation pick-up service or mobile collection unit, the address of the collection event or permanent collection center where collected wastes will be delivered, or a statement that the aggregated household hazardous waste will be transported to a hazardous waste processing, storage, or disposal facility;

(6) the name of the person who owns the property where a permanent collection center is located, where a collection event will be held, or where a mobile collection unit will be used; if the owner is different from the operator, a signed letter that clearly gives permission for the use of the property for the stated purpose must be attached to the notification;

(7) areas that are planned to be covered by the collection effort, i.e., city, county, precinct, neighborhood, district, region, etc.;

(8) the types by waste category of each type of household materials that will be collected;

(9) permanent collection centers (including sites where household hazardous waste will be stored for 24 hours or longer) must include a properly completed TCEQ Core Data Form (Form TCEQ-10400) with the notification; and

(10) the planned disposition of wastes that are received in the collection efforts, including the name(s), address(es), and United States Environmental Protection Agency (EPA) identification number(s) of the transporter(s) to be used and the name, address, and EPA identification number of each recycling and hazardous waste facilities that is planned to receive the wastes collected.

(c) Along with the notification described in subsection (b) of this section, owners or operators of a permanent collection shall submit an originally signed financial assurance mechanism acceptable to the executive director to provide for proper closure of the site(s). Prior to the notification, owners or operators must provide sufficient information to the executive director to allow the agency to determine an acceptable amount, format and type of financial assurance. Local governments as well as state and federal entities whose debts and liabilities are the debts and liabilities of a state or the United States are not subject to this subsection. Except for those operated by a local government or state or federal entity, a permanent collection center may not operate without obtaining and maintaining financial assurance acceptable to the executive director.

(d) In addition to the other requirements of this subchapter, an operator of a collection event, permanent collection center, point of generation pick-up service, mobile collection unit, or any combination of these:

(1) shall develop and follow a complete operational plan as required in §335.405(a) of this title (relating to Operational Plans) and;

(2) may not collect hazardous waste or Class 1 waste, as defined by this chapter, unless authorized under a permit or authorization issued under this chapter or Chapter 330 of this title (relating to Municipal Solid Waste);

(3) shall ship, for proper processing or disposal, aggregated household hazardous waste only to a hazardous waste processing, storage, or disposal facility that is authorized to receive household hazardous waste and that has agreed to accept the waste;

(4) shall have collected household hazardous waste transported in one of the following manners:

(A) any aggregated household hazardous waste from a collection event or permanent collection center must be transported only by a registered hazardous waste transporter under a uniform hazardous waste manifest to a hazardous waste processing, storage, or disposal facility authorized to receive household hazardous waste that has agreed to accept the wastes or as universal waste if allowed under Subchapter H, Division 1 of this chapter (relating the Universal Waste Rule);

(B) the operator may transport any household hazardous waste on a point of generation pick-up service or mobile collection unit to a permanent collection center or collection event; or

(C) the operator may have any household hazardous waste collected by a point of generation pick-up service or mobile collection unit transported by a registered hazardous waste transporter under a uniform hazardous waste manifest to a hazardous waste processing, storage, or disposal facility authorized to receive household hazardous waste that has agreed to accept the wastes or as universal waste if allowed under Subchapter H, Division 1 of this chapter;

(5) shall maintain records related to household hazardous waste collected and processed or disposed for one year after processing or disposal of the wastes; and

(6) shall report annually to the executive director the amounts of household hazardous waste and household materials collected. The operator shall submit the report by February 1st of each year for the previous calendar year, using a form provided by the commission.

(e) Owners or operators of hazardous waste processing, storage, or disposal facilities who accept or intend to accept household hazardous waste directly from households are not subject to the requirements of this subchapter other than the reporting requirements in subsection (d) of this section, provided that the acceptance of household hazardous waste is authorized in their operating permit.

§335.405. Operational Plans.

(a) A person conducting activities under this subchapter shall develop a complete operational plan prior to the collection of household materials and shall revise the plan as needed for ongoing and future operations. The operational plan must accurately depict the specific plan for how all wastes and materials will be handled during and after collection efforts. The operational plan:

(1) must identify the nature, type, and quantity of household hazardous waste and other materials proposed for collection and reuse, recycling, processing or disposal;

(2) must describe the source(s), amounts and types of wastes that would be accepted at a collection event, permanent collection center, point of generation pick-up service, mobile collection unit, or any combination of these, and if the collectors involved in the programs are not under a single operator, must describe the source(s), amounts, and types of wastes that will be transferred by a point of generation pick-up service or mobile collection unit to a collection event or permanent collection center;

(3) must establish the minimum number of operator staff, contractors, volunteers, and other individuals needed to conduct collection operations at each collection event, permanent collection center, mobile collection unit, and point of generation pick-up service covered by the operational plan; the specific functions of each type of staff; and how the training requirements that apply to their functions have been or will be met;

(4) must describe the planned disposition of all waste collected, including the name and United States Environmental Protection Agency (EPA) identification number of the transporter (or transporters) that will haul the aggregated household hazardous waste, and the name, address, and EPA identification number of the hazardous waste processing, storage, or disposal facility (or facilities) to be used for the processing, storage, disposal, recycling for energy recovery, or recycling of the aggregated household hazardous waste. If materials received in usable condition will be offered to persons for reuse, the operational plan must describe in detail the manner in which this will be done. The operator, in developing the plan for the disposition of waste to be received, shall determine the feasibility of managing collected household hazardous waste in the following order of preference:

(A) reuse for the product's intended purpose;

(B) recycling;

(C) recycling for energy recovery;

(D) treatment to destroy hazardous characteristics;

(E) treatment to reduce hazardous characteristics;

(F) underground injection; and

(G) land disposal;

(5) must include a detailed description of procedures to ensure that hazardous waste or Class 1 wastes, as defined in this chapter, are not accepted as household hazardous waste, including but not limited to screening procedures for persons bringing wastes to collections or participating in point of generation pick-up services, survey questions that will be asked of participants, and the amounts or types of wastes that will require further explanation from generators prior to acceptance;

(6) must include methods used to classify and control wastes received, including but not limited to the following:

(A) the waste streams that will be accepted and the types that will be rejected;

(B) the types of shipping containers and the storage areas to be used for each waste stream that will be accepted;

(C) the methods used to categorize wastes prior to packaging for shipment and processing or disposal;

(D) the methods used to handle and identify unknown wastes;

(E) bulking procedures if used;

(F) procedures for handling containers that are unsealed, leaking, or contaminated on their external surface when received; and

(G) procedures for any other wastes with special handling and processing or disposal needs, if any would be accepted, including but not limited to the following:

(i) radioactive materials;

(ii) medical wastes (such as used syringes);

(iii) asbestos;

(iv) polychlorinated biphenyls (PCBs);

(v) explosives;

(vi) compressed gas cylinders; and

(vii) tanks for compressed fuels;

(7) must include a detailed discussion of provisions for inclement weather, including severe weather, rain, wind, and extreme temperatures;

(8) must include a detailed discussion of recordkeeping for the wastes received and shipped for processing or disposal; and

(9) must include the following attachments:

(A) Attachment 1 is a site map constructed to show the features of the collection event site, the permanent collection center, or the site used with a mobile collection unit. The map need not be drawn to scale but must fairly represent the improvements and boundaries of the collection area. The map must be annotated to show flow of traffic, unloading points, location of emergency equipment and vehicles, and waste handling and storage areas.

(B) Attachment 2 is evidence of competency to operate, including experience and qualifications of key personnel and copies of certificates for all required training in this subchapter for all operator, contractor, or other staff or individuals who will work at any collection event, at any permanent collection center, on any mobile collection unit, in the point of generation pick-up service, or any combination of these covered by the plan.

(C) Attachment 3 is a Health and Safety Plan, including but not limited to the following information:

(i) the location and contents of the first aid kits available on site, in each mobile collection unit, and on each point of generation pick-up service vehicle;

(ii) the location and type of telephones or radios available at the site, on each mobile collection unit, and on each point of generation pick-up service vehicle for summoning emergency assistance and any specific instructions related to usage of this equipment;

(iii) detailed procedures for avoiding and responding to spills of liquid materials and solid materials, including at least the following:

(I) identifying who will respond to different sizes and types of spills (including on-site staff, emergency responders, contractors, etc.);

(II) detailed methods to be used for spill avoidance, control, and cleanup;

(III) decontamination procedures for people and equipment;

(IV) processing or disposal of contaminated materials and other wastes;

(V) types of engineering controls and personal protective equipment available on site and procedures for proper selection and use during spill responses;

(VI) the types and locations of equipment and materials available on site;

(VII) the duties of specific personnel;

(VIII) evacuation procedures (including at least the collection site and if appropriate the surrounding area); and

(IX) procedures for reporting of spills to local, state, and federal authorities;

(iv) preparation and response procedures for fires, including at least the following:

(I) the location and types of fire extinguishers and other types of fire suppression and prevention equipment available

at the site, on each mobile collection unit, and on each point of generation pick up collection vehicle;

(II) when on-site fire extinguishers and equipment would be used and when the fire department would be summoned;

(III) evacuation procedures (including the site at least and the surrounding areas if appropriate);

(IV) the identity and storage location of any materials to be collected that may require special methods for fire fighting (such as flammable liquids, flammable metals, explosives, compressed gases, aerosol cans, water reactive materials, etc.); and

(V) the availability of a local fire department and whether they can handle the largest fire possible from the planned collection either with available resources or through mutual aid arrangements;

(v) the timing and content of training or briefings on safety to be provided to staff and volunteers prior to their involvement in the waste collection.

(b) The operational plan must be available at a collection event or permanent collection center and at the offices of the entity operating the collection program. The operator shall use the operational plan as a reference in training staff, planning, and conducting collections of household hazardous waste and other materials. The operator shall maintain the operational plan for as long as collection operations are planned and for at least one year after: a collection event occurs, a permanent collection center has closed, or other types activities conducted under this subchapter cease.

(c) The operator shall provide the operational plan to the executive director upon request.

§335.407. Training Requirements.

(a) The operator shall ensure that all individuals conducting activities under this subchapter have been trained in a manner that is appropriate to their duties, using any appropriate combination of training courses as well as the operational plan as a reference for program-specific training. The training must be specific to the operation of the collection event, permanent collection center, mobile collection unit, point of generation pick-up service, or any combination of these for which the individual will have duties. The operator shall ensure that appropriate training is provided to all staff, contractors, and volunteers who participate in the collection, aggregation, storage, or transportation of household hazardous waste and in running operations to make useable materials available for reuse.

(b) The operator shall ensure that training is provided before individuals collect, aggregate, store, or transport household hazardous waste for reuse, recycling, processing, or disposal. The operator shall ensure that all training requirements under this subchapter are met for the individuals performing or responsible for specific duties. The operator shall ensure that volunteers are appropriately trained on the site rules and safety issues related to the operation prior to assisting with any collection.

(c) The training must cover any applicable training requirements in federal and state laws and regulations including:

(1) requirements of the federal Occupational Safety and Health Administration that are pertinent to duties in handling hazardous materials, responding to spills, and other activities;

(2) requirements of the Texas Hazard Communication Act, Texas Health and Safety Code, Chapter 502;

(3) requirements of the United States Department of Transportation for preparing and packaging wastes for transportation that are applicable to the specific work and operation, as specified in this subchapter; and

(4) requirements of EPA regulations at 40 Code of Federal Regulations §265.16.

(d) The operator shall ensure that individuals who handle household hazardous waste are trained under the requirements of this chapter as if the waste were hazardous wastes.

§335.409. Operation of Collection Events and Permanent Collection Centers.

(a) Location and site setup. The operator shall locate, organize, and operate a collection event or permanent collection center in a manner that safeguards the public health and welfare, physical property, and the environment. At a minimum, for any collection event, permanent collection center, or site where mobile collections units are used, the operator shall:

(1) locate the collection based on the types and quantities of waste to be collected and suitability of the site for collecting the waste;

(2) organize the activities on site in a way that allows incoming wastes to be sorted upon arrival and placed in a controlled area for packaging;

(3) provide an area, not generally accessible to the public, for sorting, packaging, and handling waste that is accepted;

(4) provide parking for the public and for essential project vehicles and queuing for vehicles waiting to offload wastes so as not to interfere with the safe entry and exit of traffic or cause traffic congestion on roads near the site;

(5) prepare for inclement weather, including provisions for sheltering personnel at or near the site during storms;

(6) designate eating, drinking, and smoking areas for personnel working at the event, area, site, or center (the operator shall prohibit such activities in the collection work area); and

(7) keep incompatible wastes separated, including unidentified wastes, prior to and after packaging for further storage or transport.

(b) Personnel and training. The operator shall ensure that personnel who work at a collection event or the permanent collection center are trained to use and follow the operational plan in conducting collection, storage, processing and disposal, and reuse activities. In addition, the operator shall ensure that the following provisions are met:

(1) Personnel who sort and package waste for transport to a hazardous waste facility and who directly oversee and supervise these activities on site must be trained and knowledgeable concerning the incompatibility of various classes of waste and qualified to package waste for transport;

(2) At every collection event and permanent collection center, at least one person trained to classify hazardous waste and competent to perform tests to identify characteristics of hazardous waste (e.g., pH, flammability, etc.) must be utilized to accept or supervise the acceptance of waste;

(3) Personnel handling waste must be instructed in accident prevention; emergency response to fires, explosions, and spills; the proper use of fire extinguishers appropriate to the materials that will be accepted; and the use of protective devices (such as respiratory gear and gloves) to minimize exposure to the household hazardous waste and other materials that would be accepted in the collection;

(4) Packaging and labeling of waste must be supervised by an individual familiar with the United States Department of Transportation (DOT) hazardous materials packaging, placarding, labeling, shipping, and hazardous waste manifest requirements;

(5) At least one person must be on site at times when wastes are handled who is trained to perform general first aid and who is knowledgeable concerning safety measures to be taken in the event of accidental contact with household hazardous waste or other hazardous materials presented for collection; the first aid training must be consistent with courses provided under the auspices of a recognized national safety organization (such as American Red Cross, National Safety Council, etc.) and must be documented with a current certificate;

(6) An on-site supervisor must be available and responsible for initiating an emergency response plan that includes site evacuation procedures. The on-site supervisor also assumes responsibility for accepting any unidentified wastes and insuring proper handling and proper processing or disposal;

(7) The on-site supervisor must have the authority to remove from the site and prohibit re-entry of any person that the supervisor determines may threaten site security or personnel safety;

(8) A collection event or permanent collection center must be manned by an adequate number of individuals who possess the necessary skills and expertise needed to accept, sort, label, and store the waste and to provide on-site supervision and public relations;

(9) When household hazardous waste or other hazardous materials are prepared for transportation, an adequate number of operator or contractor staff must be present and involved who possess the necessary skills and expertise needed to package, store, and manifest the waste; and

(10) Personnel who handle household hazardous waste or who supervise these activities must have certification through attending a Hazardous Waste Operations and Emergency Response (HAZWOPER) course appropriate to their duties. Staff involved with these activities must maintain their certification through annual refresher training. If the HAZWOPER course covers other training required by this subchapter that is not required by 29 Code of Federal Regulations §1910.1200, this fact must be documented in the certificate for the course or on a separate certificate.

(c) Equipment and materials. The operator shall provide equipment and materials at a collection event or permanent collection center to provide protection, safety and first aid for persons operating the collection, to contain and clean up spills, and to properly handle, classify, store, and label the waste. The operator shall ensure that disposable equipment and materials contaminated during a spill cleanup are handled appropriately for the type of material that was spilled. The operator shall ensure that any contaminated non-disposable equipment and materials are properly decontaminated before removal from the site. At a minimum, the operator shall provide the following equipment and material at every site and vehicle used to collect wastes:

(1) a first aid kit;

(2) a telephone or radio for contacting first responders in the event of a spill, personal injury, etc.;

(3) an eyewash and shower station, or a hosing device;

(4) at least two fire extinguishers appropriate to the wastes accepted; and

(5) sufficient spill containment and absorbent materials to contain a spill of 10% of the anticipated volume of collected liquid waste.

(d) Waste accepted and excluded. The collection program should accept only household wastes. The operator shall take necessary precautions to prohibit the receipt of waste that is defined as a hazardous waste or Class 1 wastes under this chapter. Other requirements related to acceptance or exclusion of wastes are as follows:

(1) The operator shall ensure that a chemist or trained individual knowledgeable in chemical characteristics and incompatibilities identifies any unidentified waste accepted before packaging the waste for transport. Wastes that cannot be identified by the generator or his representative when delivered or through physical assessment by qualified staff may not be packaged until the waste has been analyzed and the appropriate chemical class has been identified.

(2) Announcements and promotional material must state which types of wastes will be accepted and which types of waste will not be accepted at the collection event or permanent collection center. The operator shall provide information to potential participants prior to a collection event or the opening of a permanent collection center and at least annually during the period that a permanent collection center operates. The information provided must include all relevant instructions on the following issues, as well as any other appropriate information that may be useful to the public:

(A) the types and quantities of wastes that will be accepted and that will not be accepted;

(B) instructions for safely packaging and transporting wastes to the collection;

(C) the days and hours of operation and location of the collection site; and

(D) eligibility criteria for who can bring wastes.

(3) The operator shall ensure that waste acceptance decisions are based on the capabilities of the personnel collecting, sorting, and packaging the waste. A generic list of proposed wastes to be accepted and those that will be prohibited must be included in the operational plan. The list must be developed with the intent of minimizing the need for chemical analysis of unidentified wastes.

(4) Empty hazardous material and pesticide containers from households may be disposed of as nonhazardous waste if they are rendered unusable before leaving the collection event or permanent collection center.

(e) Temporary storage. The operator shall ensure that storage areas at a collection event or permanent collection center are operated and maintained so as to provide safe handling and storage of waste awaiting final disposition. The operator shall secure a collection event or permanent collection center to control access by the public. When storing aggregated household hazardous waste:

(1) An operator may not store aggregated household hazardous waste longer than 10 days except under one of the conditions described in subparagraphs (A) - (C) of this paragraph.

(A) The storage facility is an authorized hazardous waste processing, storage, or disposal facility;

(B) The operator requests in writing and obtains a storage time extension from the executive director. The request for an extension must state the reason that waste needs to be stored longer than ten days, the earliest date that the hazardous household waste currently on site was received, and the expected date that the waste will

be shipped to a recycling facility or a hazardous waste processing, storage, or disposal facility; or

(C) The operator is operating a permanent collection center, does not accumulate more than 3,000 kilograms of household hazardous waste, and does not store the waste longer than 180 days;

(2) If wastes are stored in original individual containers as received from the public rather than in a proper and correctly labeled shipping container that meets the DOT regulations for hazardous materials in transportation, the operator shall ensure:

(A) that all complete, legible, and correct labels are maintained on individual containers received from the public;

(B) that, if the label on any container of waste received from the public is missing, defaced, or incorrect, information needed for safe storage, transportation, and processing or disposal is marked on that container; at a minimum, this required information must cover all information required by the DOT regulations for hazardous materials in transportation; and

(C) that the date of acceptance of each individual container from the generator is placed on that container.

(3) If wastes are properly prepared for transportation and stored in proper shipping containers that are labeled consistent with the DOT regulations for hazardous materials in transportation, the individual containers received from the public do not need to be marked.

(4) The operator shall maintain records of all stored, processed, or disposed household hazardous wastes for at least one year after shipment of the waste including all the information necessary to complete manifests for the wastes. (Copies of manifests may be used in lieu of a separate record.)

§335.411. Operation of Point of Generation Pick-up Service and Mobile Collection Units.

(a) Point of generation pick-up service. An operator offering point of generation pick-up service for household hazardous waste that has been segregated from other household waste shall:

(1) develop and implement a collection program that minimizes the potential for human and animal exposure to such waste (unless the pick-up procedures involve personal contact with the generator, the operator shall provide instructions to households on details of packaging, labeling, securing, and any other procedures to safeguard humans and animals and to protect the environment from the wastes left out for pick up);

(2) provide information to potential participants prior to collections. The information provided must include all relevant issues on the following topics, as well as any other appropriate information that may be useful to the public:

(A) the information required in paragraph (1) of this subsection;

(B) eligibility criteria for who can participate in the program;

(C) the types and quantities of wastes that will be and will not be accepted; and

(D) the method households are to use for arranging pickup of their wastes;

(3) organize and operate the collections so as to safeguard the public health and welfare, physical property, and the environment;

(4) have available in each vehicle used for the point of generation pick-up service the following equipment:

(A) a first aid kit;

(B) a fire extinguisher appropriate to the wastes accepted;

(C) a means of communication to summon emergency assistance and the information needed for its use; and

(D) sufficient absorbent to contain a spill of ten percent of the maximum quantity of liquid wastes that the vehicle is designed to hold;

(5) have a person in each collection vehicle who has experience and training in handling hazardous waste, the proper use of fire extinguishers, first aid, waste classification, waste incompatibility, spill prevention, and clean-up safety;

(6) if unknown wastes will be accepted, ensure that the wastes are properly identified and meet one of the following requirements:

(A) have available on the collection vehicle all necessary testing equipment and a person qualified to identify the wastes prior to placing the wastes on the collection vehicle; or

(B) have a method in place on the collection vehicle of isolating separately in a secure manner each container of unknown waste until delivery to a collection event or permanent collection center where the waste(s) will be characterized prior to aggregating with other wastes, if this method is consistent with the United States Department of Transportation (DOT) requirements for hazardous material in transportation.

(b) Mobile collection unit. In addition to the requirements of §335.409 of this title (relating to Operation of Collection Events and Permanent Collection Centers), an operator using one or more mobile collection units to collect household hazardous waste shall:

(1) develop and implement a collection program that minimizes the potential for human exposure to or environmental harm from such waste during collection, storage, and transport;

(2) have at least one person in each vehicle who has experience and training in handling hazardous waste, the proper use of fire extinguishers, first aid, waste classification, waste incompatibility, spill prevention, and clean-up safety;

(3) maintain on each mobile collection unit the following equipment:

(A) a first aid kit;

(B) a fire extinguisher appropriate to the wastes accepted;

(C) a eye wash and emergency shower or a hosing device;

(D) a means of communication to summon emergency assistance; and

(E) sufficient absorbent and containment to contain a spill of ten percent of all liquid wastes on the unit;

(4) if unknown wastes will be accepted, ensure that the wastes are properly identified and meet one of the following requirements:

(A) have available on the mobile collection unit all necessary testing equipment and a person qualified to identify the wastes prior to placing the wastes on the unit; or

(B) have a method in place on the mobile collection unit of isolating separately in a secure manner each container of unknown

waste until delivery to a collection event or permanent collection center where the waste(s) will be characterized prior to aggregating with other wastes, if this method is consistent with the DOT requirements for hazardous material in transportation; and

(5) if the mobile collection unit is used to transport household hazardous waste to a hazardous waste processing, storage, or disposal facility, register the mobile collection unit as a transporter and manifest the aggregated household hazardous waste, or ship the household hazardous waste as universal waste if allowed under Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule).

(c) Point of generation pick-up service or mobile collection unit. The operator of a point of generation pick-up service or mobile collection unit shall also:

(1) comply with the personnel requirements in §335.409(b) of this title;

(2) comply with the waste acceptance and exclusion requirements in §335.409(d) of this title;

(3) comply with the temporary storage requirements in §335.409(e) of this title; and

(4) within 24 hours of receipt from the public, deliver collected household hazardous waste to a permanent collection center or collection event to be aggregated with other household hazardous waste, or have the household hazardous waste transported by a transporter that meets the requirements in §335.415 of this title (relating to General Requirements for Transporters) to a hazardous waste processing, storage, or disposal facility that is authorized to accept household hazardous waste that has agreed to accept the wastes or as universal waste if allowed under Subchapter H, Division 5 of this chapter.

§335.413. General Shipping, Manifesting, Recordkeeping, and Reporting Requirements.

(a) Except for those collected reusable materials handled in accordance with the requirements of §335.419 of this title (relating to Reuse of Collected Material) and wastes received at the center which are not household hazardous waste, persons who collect, receive, or aggregate household hazardous waste shall:

(1) utilize only hazardous waste transporters who have notified the executive director with respect to transportation of hazardous waste, who have notified the United States Environmental Protection Agency (EPA) of their involvement in transporting hazardous waste, and who have been issued an EPA identification number, for transporting or shipping household hazardous waste from a collection event or permanent collection center, except for household hazardous waste that is shipped as universal waste under the provisions of Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule);

(2) ship, using a uniform hazardous waste manifest or following the universal waste rules if appropriate to the type(s) of waste(s) being shipped, household hazardous waste from a collection event or permanent collection center only to receivers that are permitted as hazardous waste processing, storage, or disposal facilities with authorization to receive household hazardous waste and that have agreed to accept the waste;

(3) package and label household hazardous waste so as to apply the applicable United States Department of Transportation requirements and the requirements contained in §335.10 of this title (relating to Shipping and Reporting Procedures Applicable to Generators of Municipal Hazardous Waste or Class 1 Industrial Solid Waste) to the household hazardous waste as if it was hazardous waste; and

(4) retain for at least one year from the date of shipment copies of all manifests and bills of lading utilized for the shipment of household hazardous waste, and make the records available to the executive director upon request.

(b) For all wastes received and materials offered for reuse, an operator shall:

(1) report annually to the executive director by February 1st for the previous calendar year the amount of household hazardous waste and other wastes received, including materials offered for reuse, using a form provided by the agency; and

(2) ensure that all wastes received are properly processed or disposed under all federal, state, and local requirements that are applicable to the specific waste; if materials offered for reuse are later shipped for processing or disposal without having been transferred to another person, the materials must be processed or disposed as required for household hazardous waste if they have any characteristic of hazardous waste.

§335.415. General Requirements for Transporters.

(a) A person may not transport household hazardous waste required by this subchapter to be accompanied by a uniform hazardous waste manifest, unless such person:

(1) has notified the executive director with respect to hazardous waste transportation activities in accordance with the requirements contained in §335.6(d) of this title (relating to Notification Requirements);

(2) has notified the EPA as to his or her transporter status, and has been issued an United States Environmental Protection Agency (EPA) identification number;

(3) applies the requirements outlined in §335.11 of this title (relating to Shipping Requirements for Transporters of Municipal Hazardous Waste or Class 1 Industrial Solid Waste) to all manifested household waste as if it was hazardous waste;

(4) applies the requirements outlined in §335.14 of this title (relating to Recordkeeping Requirements Applicable to Transporters of Municipal Hazardous Waste or Class 1 Industrial Solid Waste) to all manifested household waste as if it was hazardous waste; and

(5) applies the requirements of §335.4(1) - (3) of this title (relating to General Prohibitions) to all household hazardous waste accepted or handled as if it was hazardous waste.

(b) A transporter who is engaged in a point of generation pick-up service of household hazardous waste, who operates or intends to operate any household hazardous waste collection event, mobile collection unit, or a permanent collection center, or who otherwise handles or accepts household hazardous waste from households or the public, shall comply with all the applicable requirements of this subchapter set forth for operators and shall keep all household hazardous waste accumulated separate and apart from hazardous waste or Class 1 waste, as defined in this chapter, which is accumulated at a transporter's facilities.

§335.417. General Requirements for Processing, Storage, or Disposal Facilities.

(a) An owner or operator of a hazardous waste processing, storage, or disposal facility with a permit authorizing the receipt of household hazardous waste may receive in compliance with the permit household hazardous waste shipped under a uniform hazardous waste manifest or as universal waste.

(b) Owners or operators of hazardous waste processing, storage, or disposal facilities with a permit authorizing the receipt of household hazardous waste may receive household hazardous waste directly from households without meeting any of the other provisions of this

subchapter provided that the quantities received are reported to the executive director as described in §335.403(d)(6) of this title (relating to General Requirements for Household Hazardous Waste Collections).

§335.419. Reuse of Collected Material.

Any material collected or accepted by a collector or operation in its original container with a legible label or that is otherwise readily identifiable and which has been determined by the collector or operator to be in a usable condition may be removed from the aggregated household hazardous waste and provided to a person for use. Storage of materials offered for reuse is not subject to the requirements of this subchapter. If any reusable material is shipped for processing or disposal without having been transferred to another person, the operator shall ensure that the material is processed or disposed as household hazardous waste under the requirements of this subchapter if it meets the definition of household hazardous waste in §335.402(6) of this title (relating to Definitions).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800621
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 239-6091

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CHAPTER 337. DRY CLEANER ENVIRONMENTAL RESPONSE

The Texas Commission on Environmental Quality (commission or agency) proposes amendments to §§337.3, 337.4, 337.11, 337.13, 337.14, 337.31, 337.32, and 337.51. The commission also proposes new §§337.16 - 337.18, 337.52, 337.53 and 337.64.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of the proposed rules is to implement House Bill (HB) 3220, 80th Legislature, 2007, and to provide for more efficient administration and enforcement of Texas Health and Safety Code (THSC), Chapter 374. HB 3220 revises statutes relating to the dry cleaner environmental response program created by the 78th Legislature, 2003, and codified in THSC, Chapter 374. HB 3220 amends THSC, §§374.102 - 104, 374.154, and 374.207. HB 3220 also adds the following new sections to THSC, Chapter 374: §§374.1022 - 374.1023, and 374.1535. HB 3220 establishes new requirements for registration of dry cleaner property owners and preceding property owners who wish to obtain eligibility for Dry Cleaning Facility Release Fund (Fund) benefits. Additionally, the bill allows an owner of a non-participating drop station to move the business to another location and retain the drop station's non-participating status. The bill also prohibits the use of perchloroethylene at sites where the commission has completed corrective action. In addition to rule changes proposed for the purpose of implementing these provisions of HB 3220, certain rule changes are being proposed for the purpose of more efficient administration and enforcement of THSC, Chapter 374. These include: a provision prohibiting a person, in addition to a distributor, from purchasing or otherwise obtaining dry cleaning solvent for an unregistered dry cleaning facility or for a dry cleaning drop station; provisions expanding the basis of and procedures for revocation or denial of a dry cleaner or distributor registration certificate; a provision clarifying that annual registration fee billing dates are established by the executive director; a provision requiring that once corrective action under the Fund has begun at a site, the site must remain in the Dry Cleaner Remediation Program (Program) until corrective action is completed at the site; and additional definitions, a section title change, and other changes to phrasing made for the purpose of clarity and for the purpose of consistency within the rule, as well as between the rule and THSC, Chapter 374.

In addition, the commission is soliciting comments on adding further language to §337.52 that would prohibit the use of perchloroethylene at a site once corrective action has begun at that site under the Dry Cleaning Facility Release Fund. Based on comments that may be received on this issue, such language may be incorporated into the adopted version of these rules. Additionally, if such language is incorporated, Section 337.52 would be changed to say that the written notice concerning the prohibition on perchloroethylene would be filed at the commencement of corrective action rather than at the completion of corrective action.

SECTION BY SECTION DISCUSSION

The commission proposes to amend Chapter 337, Dry Cleaner Environmental Response, to establish the procedures to administer and enforce HB 3220, and to provide for more efficient administration and enforcement of THSC, Chapter 374.

The commission proposes to amend §337.3, Definitions, to add definitions for Property Owner and Preceding Property Owner. The additional definitions are necessary to clarify that the meaning of these terms is consistent with the meaning set out in THSC, §374.1022. Renumbering of two additional definitions will be necessary in order to accommodate this change.

The commission proposes to amend §337.4, General Prohibitions and Requirements, to clarify, in §337.4(b), that a dry cleaning facility must have a registration certificate issued pursuant to §337.11 in order for a distributor to distribute dry cleaning solvent to the facility. The purpose of this change is to distinguish a registration certificate issued pursuant to §337.11, which qualifies a facility to receive dry cleaning solvent, from a registration certificate issued pursuant to the newly proposed §337.17, which does not qualify a facility to receive dry cleaning solvent. In addition, §337.4(h) is proposed to prohibit a person, in addition to a distributor, from purchasing or otherwise obtaining dry cleaning solvent for a dry cleaning facility unless the facility has a registration certificate issued pursuant to §337.11. Finally, §337.4(i) is proposed to prohibit a person, in addition to a distributor, from purchasing or otherwise obtaining dry cleaning solvent for a dry cleaning drop station. Subsections (h) and (i) are amended to provide an enforcement mechanism in the event that persons, in addition to distributors, obtain solvent for drop stations or unregistered dry cleaning facilities.

The commission proposes to amend §337.11, Dry Cleaner Registration Certificates, to expand the basis of and procedures for revocation or denial of a dry cleaner registration certificate. With this amendment, the basis for revocation or denial of a dry cleaner registration certificate becomes more consistent with the basis for revocation or denial that is set out in rules

for similar program areas, such as the Petroleum Storage Tank program. In addition, the expanded basis of and procedures for revocation or denial of a dry cleaner registration certificate will allow needed flexibility for revocation or denial of a certificate based on circumstances other than the very limited ones contemplated by the existing rule. For example, the proposed amendment would allow the commission to revoke a dry cleaner registration certificate in the event that a facility owner fails to respond to the executive director upon initiation of an enforcement action, neglecting to pay penalties assessed and/or to take measures necessary to correct the violation that resulted in the enforcement action.

The commission proposes to amend §337.13, Distributor Registration Certificate, to expand the basis of and procedures for revocation or denial of a distributor registration certificate. With this amendment, the basis for revocation or denial of a distributor registration certificate becomes more consistent with the basis for revocation or denial that is set out in rules for similar program areas, such as the Petroleum Storage Tank program. In addition, the expanded basis of and procedures for revocation or denial of a distributor registration certificate will allow needed flexibility for revocation or denial of a certificate based on circumstances other than the very limited ones contemplated by the existing rule. For example, the proposed amendment would allow the commission to revoke a distributor registration certificate in the event that a distributor fails to respond to the executive director upon initiation of an enforcement action, neglecting to pay penalties assessed, and/or to take measures necessary to correct the violation that resulted in the enforcement action.

The commission proposes to amend §337.14, Registration Fees, to add, "for Dry Cleaning Facilities and Drop Stations" to the section title. This is to differentiate this section from §337.18, the new property owner and preceding property owner registration fee section. In addition, §337.14(c) is also amended to clarify that the annual registration fee may be divided into quarterly payments and billed on dates established by the executive director. Finally, §337.14(c) is amended to delete the phrase, "of registration fees" to improve readability.

New §337.16, Registration by Property Owner or Preceding Property Owner, sets forth the registration requirements for property owners and preceding property owners. All owners and preceding owners of real property on which a dry cleaning facility or drop station is or was located, who wish to obtain eligibility for Fund benefits, must be registered with the commission in accordance with THSC, §374.1022. This section sets out the required registration procedures, including when to register, how to register, when to update information, and who may complete and submit registration forms.

New §337.17, Property Owner or Preceding Property Owner Registration Certificate, sets forth the procedures related to registration certificates for property owners or preceding property owners, including obtaining and displaying a certificate, as well as the process for revocation or denial of a certificate. A property owner or preceding property owner must have a valid registration certificate issued pursuant to this section in order to apply for corrective action under the Fund.

New §337.18, Registration Fees for Property Owners and Preceding Property Owners, sets forth the procedures and requirements for property owners and preceding property owners to pay the registration fees required by THSC, §374.1022. The annual registration fee may be divided into quarterly payments and billed on dates established by the executive director. However, past annual registration and late fees must be paid in full at the time of registration and may not be divided into quarterly payments. The proposed rule also requires payment of penalties and interest in accordance with 30 TAC Chapter 12, Payment of Fees, for payments that are not made by the due date. Registration certificates will not be issued until all registration and any late fees due pursuant to THSC, §374.1022, in addition to any penalties and interest assessed, are paid in full. The proposed rule requires that a property owner or preceding property owner who has registered a site pursuant to §337.16 must continue to pay annual registration fees in accordance with THSC, §374.1022 for the duration of corrective action at the site under the Fund.

The commission proposes to amend §337.31, Ranking of Sites, by deleting the phrase, "including former owners of dry cleaning facilities and owners of real property on which a dry cleaning facility was formerly located that meet the eligibility criteria" from §337.31(a)(2). This change is proposed for the sake of consistency within the rule, as well as between the rule and THSC, Chapter 374.

The commission proposes to amend §337.32, Denial and Removal of Sites from Ranking, by deleting the phrase, "for any dry cleaning facility or dry cleaning drop station" and adding the phrase, "pursuant to this chapter" in §337.32(a)(3). These changes are proposed for the purpose of consistency within the rule, as well as between the rule and THSC, Chapter 374.

The commission proposes to amend §337.51, Eligibility for Corrective Action, by deleting the phrase, "for any dry cleaning facilities or dry cleaning drop station that the person owns" from §337.51(3). This change is proposed for the purpose of clarity and for consistency within the rule, as well as between the rule and THSC, Chapter 374.

New §337.52, Deed Notice of Site Restrictions After Corrective Action, states that following the completion of corrective action under Chapter 337, a notice will be filed in the real property records of the county or counties in which the site is located, notifying future property owners that, pursuant to THSC, §374.1535, perchloroethylene may not be used at that site. The purpose of this proposed rule is to implement THSC, §374.1535.

In addition, the commission is soliciting comments on adding further language to §337.52 that would prohibit the use of perchloroethylene at a site once corrective action has begun at that site under the Dry Cleaning Facility Release Fund. Based on comments that may be received on this issue, such language may be incorporated into the adopted version of these rules. Additionally, if such language is incorporated, §337.52 would be changed to say that the written notice concerning the prohibition on perchloroethylene would be filed at the commencement of corrective action rather than at the completion of corrective action.

New §337.53, Withdrawal of Site from the Dry Cleaner Remediation Program, sets forth the requirement that once corrective action costs have been incurred at a site by the Program, an applicant may not withdraw the site from the Program prior to completion of corrective action at the site. Exceptions to this requirement may be allowed upon approval of the executive director in the event that corrective action has been suspended, postponed, or terminated at a site in accordance with §337.30 or §337.50. This rule is proposed for the purpose of implementing THSC, §374.1535. Under this rule, when costs are incurred by the Program for corrective action at a site, the site must stay in the Program until the completion of corrective action under the

Fund, and, therefore, become subject to the requirement that perchloroethylene may no longer be used at the site. This rule aims to avoid the situation of a site being withdrawn from the Program after corrective action has begun under the Fund, but prior to the completion of corrective action. By requiring that sites remain in the Program until the completion of corrective action, this rule reduces the risk of continued use of perchloroethylene and possible re-contamination of a site where money from the Fund has been expended for corrective action. In addition to implementation of THSC, §374.1535, therefore, this rule also ensures responsible management of the Fund.

New §337.64, Retaining Nonparticipating Status for a Drop Station Moved to a New Location, sets forth the procedures and requirements for drop station owners who move a drop station to a new location to be able to retain the drop station's nonparticipating status. The proposed rule requires that the owner submit the same type of documentation for the new location that was required for the original nonparticipating drop station, including property owner consent and an affidavit attesting that perchloroethylene has never been used at the new location and that the owner will not ever use or allow the use of perchloroethylene at the new location. The rule also states that a registration certificate issued for a nonparticipating drop station is valid for only one location. Once the drop station moves to a new location, the original site will no longer be considered nonparticipating.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Chris Hayden, Analyst, Chief Financial Officer Division, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the commission as a result of the administration or enforcement of the proposed rules. No fiscal implications are anticipated for other units of state or local governments. The proposed rules are anticipated to result in an increase in revenue for the Fund, though the level of this increase is not expected to be significant. Any costs to the commission to implement the proposed rules will be absorbed using current commission resources.

The purpose of the proposed rules is to implement House Bill (HB) 3220, 80th Legislature, Regular Session, and to facilitate more efficient administration and enforcement of THSC, Chapter 374. The proposed rules establish new registration and fee requirements for owners and preceding owners of real property on which a dry cleaning facility or drop station is or was located, who wish to obtain eligibility for Fund benefits. Property owners and preceding property owners who wish to apply for a site to be addressed under the Fund must pay an annual registration fee prior to applying for Fund benefits and must continue to pay an annual fee for the duration of any corrective action on the affected property. The proposed rules allow an owner of a non-participating drop station to move the business to another location and retain the drop station's non-participating status. The proposed rules would also provide that, following the completion of corrective action at a site under Chapter 337, a written notice will be filed in the real property records of the county or counties in which the site is located to notify future property owners that, pursuant to THSC, §374.1535, perchloroethylene may not be used at that site. In addition, certain amendments are being proposed to facilitate more efficient administration and enforcement of THSC, Chapter 374. Property owners and preceding property owners who want to be eligible for Fund benefits will be assessed an annual registration fee of $1,500 per year. The statutory deadline for registration is December 31, 2007. Property owners and preceding property owners can register after the deadline but must pay all back fees and a $100 per month late fee. There are approximately 4,000 registered dry cleaner locations and not all sites eligible for Fund benefits are required to register. It is unknown how many property owners or preceding property owners exist or would want Fund eligibility, and therefore it is not known how much in additional revenue the new fee will generate. Annual registration fees can be divided into quarterly payments. Although HB 3220 requires the refund of fee credits to dry cleaners that elected not to participate in the program, it is not anticipated that there will be a significant number of refunds that would significantly reduce the amount of revenue available in the Fund.

While the proposed rules do not address solvent fees, HB 3220 increases the delivery fee for perchloroethylene from $15 to $20 per gallon and reduces the fee for other solvents from $5 to $3 per gallon. This fee change is expected to result in an estimated additional revenue amount of $400,000 each year to the Fund. Also, HB 3220 imposes a lien against the real property that is subject to a corrective action taken under THSC, Chapter 374 if a property owner or preceding property owner does not pay a registration fee under THSC, §374.1022 that is due while the corrective action is ongoing.

Local government and state agencies are not expected to experience fiscal implications because of the proposed rules.

PUBLIC BENEFITS AND COSTS

Mr. Hayden also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and the expansion of Fund benefits to include dry cleaning property owners and preceding property owners.

Individuals and businesses are not expected to experience significant fiscal implications due to the implementation of the proposed rules. It is anticipated that the fiscal impact of the proposed rules would be limited to property owners or preceding property owners who wish to obtain eligibility for Fund benefits. These owners will have to pay an annual registration fee of $1,500 each year. If they do not meet the December 31, 2007 deadline to register, they must pay all back fees and a $100 per month late fee. Of the estimated 4,000 registered dry cleaner locations, it is unknown how many property owners or preceding property owners exist or how many would want Fund eligibility. HB 3220 imposes a lien on the property for the costs of the corrective action, plus the amount of unpaid fees that accrue during the period of the corrective action, for property owners or preceding property owners who fail to pay registration fees while corrective action is ongoing.

The proposed rules allow an owner of a non-participating drop station to move the business to another location and retain the drop station's non-participating status. Non-participating drop station owners who relocate must complete an affidavit and obtain property owner consent. There are currently 110 non-participating drop stations, and it is unknown how many will choose to relocate, but it is estimated to be a small percentage. There is no fee for an affidavit.

The changes to solvent fee rates are provided in statute and are not part of this proposed rulemaking. They are estimated to generate an additional $100,000 per quarter, or $400,000 per year, in revenue. This equates to $100 per year, per dry cleaner lo-

cation. The cost per dry cleaner will depend on how much perchloroethylene is used each year. According to registration data collected by the commission, approximately 62% of dry cleaner facilities use perchloroethylene. Any increased cost to a dry cleaner as a result of solvent fees will be passed on to the consumer and is estimated to be minimal.

HB 3220 prohibits the use of perchloroethylene at sites where the commission has completed corrective action. The proposed rules implement this prohibition by providing that, following the completion of corrective action at a site under Chapter 337, a written notice will be filed in the real property records of the county or counties in which the site is located to notify future property owners that, pursuant to THSC, §374.1535, perchloroethylene may not be used at that site.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

The proposed rules are not anticipated to have adverse fiscal implications for small or micro-businesses. Based on reported gross receipts from past years, it is estimated that most of the dry cleaning facilities and drop stations in the state are small or micro-businesses.

The fiscal impact of the proposed rules would be limited to those property owners or preceding property owners who wish to obtain eligibility for Fund benefits. These owners will have to pay an annual registration fee of $1,500 each year to receive Fund eligibility. If they do not meet the December 31, 2007 deadline to register, they must pay all back fees and a $100 per month late fee. Of the estimated 4,000 registered dry cleaner locations, it is unknown how many property owners or preceding property owners exist or how many would want Fund eligibility. HB 3220 imposes a lien on the property for the costs of the corrective action, plus the amount of unpaid fees that accrue during the period of the corrective action, for property owners or preceding property owners who fail to pay registration fees while corrective action is ongoing.

Although fee rate changes are not in these proposed rules, it is estimated that an additional $100,000 per quarter, or $400,000 per year, in solvent fee revenue will occur. This analysis anticipates that any increase in cost to small and micro-businesses will be passed on to the consumer and is estimated to be minimal.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect small or micro businesses for the first five years the proposed rules are in effect and the proposed rules are needed to comply with state law.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that this rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. Although the intent of the proposed rules is to protect the environment or reduce risks to human health from environmental exposure, the proposed rules would not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Furthermore, even if the proposed rules did meet the definition of a major environmental rule, Texas Government Code, §2001.0225 only applies to a major environmental rule if the result of the rule is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the commission instead of under a specific state law. These proposed rules do not meet any of the four applicability requirements and thus are not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225 even if they did meet the definition of a major environmental law. Specifically, the proposed rules are necessary to implement recent changes to state law and to more effectively administer and enforce state law, are not proposed solely under the general powers of the commission, and do not exceed a requirement of state law, federal law, or a delegation agreement or contract between the state and an agency or representative of the federal government.

The commission invites public comment on this draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rules and performed an assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13).

The proposed rules implement HB 3220, which amends THSC, Chapter 374. The proposed rules also include certain amendments to Chapter 337, which are proposed for the purpose of more effective administration and enforcement of THSC, Chapter 374. THSC, Chapter 374 addresses the environmental regulation and remediation program for dry cleaning facilities and dry cleaning drop stations. Under the program, certain dry cleaners pay registration and solvent fees into a fund that is then used by the commission to investigate and clean up eligible contaminated dry cleaning sites. Contamination from dry cleaning facilities is a real and substantial threat to public health and safety, and the legislation and proposed rules respond to this threat in three ways. First, the legislation and proposed rules respond to the threat of contamination by requiring that property owners and preceding property owners who wish to apply for a site to be addressed under the Fund must pay an annual registration fee prior to applying and must continue to pay an annual fee for the duration of corrective action under the Fund. This requirement is expected to increase the amount of money in the Fund, thereby maximizing the number of contaminated dry cleaning sites within the state that can be addressed under the Fund. Second, the legislation responds to the threat of contamination by prohibiting

the use of perchloroethylene at sites where corrective action has been completed under the Fund. This prohibition alleviates the possibility of future contamination from the dry cleaning solvent perchloroethylene at a site that has been addressed under the Fund. Implementing the legislation, the proposed rules respond to the threat of contamination by providing that a written notice will be filed in the real property records of the county in which the site is located, notifying future property owners that, pursuant to the legislation, perchloroethylene may not be used at that site. Third, the rules respond to the threat of contamination by prohibiting a person, in addition to a distributor, from purchasing or otherwise obtaining dry cleaning solvent for an unregistered dry cleaning facility or for a dry cleaning drop station. The legislation and rules do not allow such facilities to obtain dry cleaning solvent, and providing for enforcement against any person who circumvents the rules in this way will help to advance the legislation's purpose of preserving, protecting, and maintaining the water and other natural resources of this state.

The proposed rules significantly advance a health and safety purpose by providing the framework within which the commission processes property owner and preceding property owner registrations, and collects the funds for corrective action, so that those funds can be utilized to address health and safety concerns at sites around the state. Furthermore, as previously discussed, the proposed rules significantly advance a health and safety purpose by providing for written notice of the statutory prohibition against the use of perchloroethylene at sites addressed under the Fund and by providing an additional enforcement mechanism in the event that a person obtains dry cleaning solvent for drop stations or unregistered dry cleaning facilities. Finally, the proposed rules significantly advance a health and safety purpose by requiring that, once corrective action costs have been incurred at a site by the Program, an applicant may not withdraw the site from the Program prior to completion of corrective action at the site. Exceptions to this requirement may be allowed upon approval of the executive director in the event that corrective action has been suspended, postponed, or terminated at a site in accordance with §337.30 or §337.50. These rules ensure that sites addressed under the Fund will become subject to the requirement that perchloroethylene may no longer be used at the site, and therefore reduce the risk of continued use of perchloroethylene and possible re-contamination of a site where money from the Fund has been expended for corrective action.

The proposed rules are narrowly tailored to implement HB 3220 and provide for more efficient administration and enforcement of THSC, Chapter 374, and do not impose a greater burden than is necessary to achieve the health and safety purpose as previously stated.

Nevertheless, the commission further evaluated these proposed rules and performed an assessment of whether these proposed rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of this rulemaking is to implement HB 3220 and to provide for more efficient administration and enforcement of THSC, Chapter 374 by setting forth: 1) procedures governing registration and certificates for, and collection of fees from, property owners and preceding property owners who wish to obtain eligibility for Fund benefits; 2) procedures allowing an owner of a non-participating drop station to move the business to another location and retain the drop station's non-participating status; 3) the provision that, once corrective action has been completed under the Fund, a written notice will be filed in the real property records of the county in which the site is located to notify future property owners of the statutory prohibition against the use of perchloroethylene at the site; 4) a provision prohibiting a person, in addition to a distributor, from purchasing or otherwise obtaining dry cleaning solvent for an unregistered dry cleaning facility or for a dry cleaning drop station; 5) amended procedures for revocation or denial of a dry cleaner or distributor registration certificate; 6) clarified procedure for administration of dry cleaning facility and drop station registration fee billing and payment; 7) a prohibition against withdrawal of a site from the Program once the Program has incurred corrective action costs at the site; and 8) two additional definitions, one section title change, and other similar changes to phrasing made for the purpose of clarity and for the purpose of consistency within the rule, as well as between the rule and THSC, Chapter 374.

Promulgation and enforcement of the proposed rules would be neither a statutory nor a constitutional taking of private real property by the commission. Specifically, the proposed rules do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally) nor restrict or limit the owner's rights to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the proposed rules. For example, though a deed notice is proposed in §337.52, it does not burden property or restrict or limit an owner's right to property. The deed notice is a notice of a statutory prohibition against the use of perchloroethylene at sites addressed under the Fund. The prohibition would exist with or without the filing of any deed notice. The notice itself places no burden, restriction, or limitation on property. Nor does the notice devalue property, given that the statutory prohibition exists independently of the notice.

The proposed rules implement HB 3220 and provide for more efficient administration and enforcement of THSC, Chapter 374. There are no burdens imposed on private real property from these proposed rules and the benefits to society are the proposed rules' specific procedures and requirements for a program that addresses dry cleaning contamination and seeks to prevent future contamination.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is procedural in nature as it pertains to the CMP, and will have no substantive effect on commission actions subject to the CMP, and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin, Texas, on March 11, 2008, at 10:00 a.m., in Building E, Room 201S, at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle. The hearing will

be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons planning to attend the hearing, who have special communication or other accommodation needs, should contact John Gaete, Office of Legal Services, at (512) 239-6091. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to John Gaete, MC 205, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2007-035-337-PR. The comment period closes March 17, 2008. Copies of the proposed rulemaking can be obtained from the commission's website at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Don Kennedy, Permitting and Remediation Support Division, (512) 239-2154 or Barbara Watson, Litigation Division (512) 239-2044.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §337.3, §337.4

STATUTORY AUTHORITY

The amended sections are proposed under the authority granted to the commission by the 80th Legislature in Texas Health and Safety Code (THSC), Chapter 374. The amended sections are also proposed under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and the THSC; TWC, §26.011, which provides the commission the powers necessary or convenient to carry out its responsibilities; THSC, §361.017, which provides the commission the powers necessary or convenient to carry out its responsibilities under the Solid Waste Disposal Act (SWDA); THSC, §361.024, which authorizes the commission to adopt rules consistent with the SWDA and establish minimum standards of operation for the management and control of solid waste; and HB 3220, 80th Legislature, 2007.

The proposed amended sections implement THSC, Chapter 374.

§337.3. Definitions.

Definitions set forth in Texas Health and Safety Code, Chapter 374 and §3.2 of this title (relating to Definitions) that are not specifically included in this section also apply. The following words and terms, when used in this chapter, have the following meanings.

(1) Application for ranking--The form approved by the executive director for an applicant to provide information pertaining to a dry cleaning facility and which is used, in part, for the prioritization of sites for corrective action.

(2) Distributor--A person that:

(A) maintains or uses, permanently or temporarily, directly or indirectly, or through an agent, by whatever name called, an office, place of distribution, sales or sample room, warehouse or storage place, or other place of business that is used, in whole or part, for selling, distributing, or delivering dry cleaning solvent;

(B) has any representative, agent, salesperson, canvasser, or solicitor who operates in Texas under the authority of the distributor to sell, deliver, or take orders for dry cleaning solvent;

(C) uses independent contractors in direct sales, distribution, or delivery of dry cleaning solvent in Texas;

(D) allows a franchisee or licensee to operate under its trade name if the franchisee or licensee is required to collect Texas fees on dry cleaning solvent;

(E) conducts business in Texas through employees, agents, or independent contractors for the purpose of selling, distributing, or delivering dry cleaning solvent; or

(F) otherwise distributes dry cleaning solvent to dry cleaning facilities or dry cleaning drop stations doing business in Texas.

(3) Dry cleaning machine--The equipment used for the purpose of cleaning garments or other fabrics using a process that involves any use of dry cleaning solvents; a dry cleaning unit.

(4) Dry cleaning waste--The waste, including dry cleaning wastewater, that is generated at a dry cleaning facility and that contains dry cleaning solvents.

(5) Dry cleaning wastewater--The separator water and all other water that is generated during the dry cleaning process and that contains dry cleaning solvents.

(6) Empty--The status of a dry cleaning machine in which all solvents have been removed as completely as possible by the use of commonly employed and accepted industry procedures.

(7) Gross annual receipts--The sum of all payments or compensation, including payments or compensation from laundry and other revenue generating activities, received by a dry cleaning facility or drop station, less any returns, discounts, or allowances. The calculation of gross annual receipts must not be reduced for cost of goods sold, general and administrative expenses, depreciation and amortization, or other operating expenses. Gross annual receipts do not include any taxes imposed on the services provided by any municipality, state, or other governmental unit and collected by the dry cleaning facility or drop station for such governmental unit.

(8) In service--The status of a dry cleaning machine that it is being used for cleaning garments or other fabrics with a process that involves any use of dry cleaning solvents.

(9) Nonparticipating non-perchloroethylene user registration certificate--A registration certificate issued by the executive director to a facility designated as a nonparticipating facility in accordance with Texas Health and Safety Code, §374.104.

(10) Operating dry cleaning drop station--A dry cleaning drop station that has accepted clothes for dry cleaning anytime during the state fiscal year.

(11) Operating dry cleaning facility--A dry cleaning facility in which there is at least one operating dry cleaning machine in service anytime during the state fiscal year.

(12) Participating non-perchloroethylene user registration certificate--A registration certificate issued by the executive director to an owner designated as a nonuser of perchloroethylene in accordance with Texas Health and Safety Code, §374.103(b)(1) as that subsection existed from September 1, 2003, until August 31, 2005.

(13) Permanently removed from service--The status of a dry cleaning machine when its use is terminated by removal from the dry cleaning facility in accordance with this chapter.

(14) Preceding Property Owner--a preceding owner of real property as described in Texas Health and Safety Code, §374.1022(a)(2).

(15) Property Owner--an owner of real property as described in Texas Health and Safety Code, §374.1022(a)(1).

(16) [~~(14)~~] Secondary containment--A containment method by which a continuous barrier is installed around and under the primary storage vessel (e.g., tank or piping) in a manner designed to prevent a release from migrating beyond the secondary barrier.

(17) [~~(15)~~] Temporarily removed from service--The status of a dry cleaning machine that is not being used for cleaning garments or other fabrics for a time period not to exceed one year and that has not been permanently removed from service.

§337.4. General Prohibitions and Requirements.

(a) New dry cleaning facilities must meet the performance standards in §337.20 of this title (relating to Performance Standards).

(b) A distributor is prohibited from selling, delivering, or otherwise distributing any dry cleaning solvent to a dry cleaning facility unless the dry cleaning facility has a valid, current registration certificate issued by the executive director pursuant to §337.11 of this title (relating to Dry Cleaner Registration Certificates). Prior to sale, delivery, or other distribution of the dry cleaning solvent, the distributor must obtain and record the registration number and registration expiration date of the dry cleaning facility's registration certificate.

(c) A distributor shall not sell, deliver, or otherwise distribute the dry cleaning solvent perchloroethylene to a dry cleaning facility with a nonparticipating non-perchloroethylene user registration certificate or a participating non-perchloroethylene user registration certificate.

(d) A person is prohibited from purchasing dry cleaning solvent from a distributor that does not have a valid, current distributor registration certificate issued by the executive director.

(e) A distributor is prohibited from selling or otherwise distributing dry cleaning solvent to a dry cleaning facility unless the distributor has a valid, current distributor registration certificate issued by the executive director.

(f) A person is prohibited from purchasing the dry cleaning solvent perchloroethylene for a dry cleaning facility with a nonparticipating non-perchloroethylene user registration certificate or a participating non-perchloroethylene user registration certificate.

(g) A distributor is prohibited from selling, delivering, or otherwise distributing any dry cleaning solvent to a dry cleaning drop station.

(h) A person is prohibited from purchasing or otherwise obtaining any dry cleaning solvent for a dry cleaning facility unless the dry cleaning facility has a valid, current registration certificate issued by the executive director pursuant to §337.11 of this title.

(i) A person is prohibited from purchasing or otherwise obtaining any dry cleaning solvent for a dry cleaning drop station.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800614
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 239-6091

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SUBCHAPTER B. REGISTRATION, CERTIFICATES, AND FEES

30 TAC §§337.11, 337.13, 337.14, 337.16 - 337.18

STATUTORY AUTHORITY

The amended and new sections are proposed under the authority granted to the commission by the Texas Legislature in THSC, Chapter 374. The amended and new sections are also proposed under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and the THSC; TWC, §26.011, which provides the commission the powers necessary or convenient to carry out its responsibilities; THSC, §361.017, which provides the commission the powers necessary or convenient to carry out its responsibilities under the Solid Waste Disposal Act (SWDA); THSC, §361.024, which authorizes the commission to adopt rules consistent with the SWDA and establish minimum standards of operation for the management and control of solid waste; and HB 3220, 80th Legislature, 2007.

The proposed amended and new sections implement THSC, Chapter 374.

§337.11. Dry Cleaner Registration Certificates.

(a) Before the executive director evaluates a registration to determine if a registration certificate should be issued, each registration must be administratively complete. A registration is not administratively complete if:

(1) the registration form has not been completed and submitted to the agency in accordance with this chapter;

(2) the registration form does not contain all requested information with clear, legible, and true responses;

(3) all fees, penalties, and interest owed to the agency have not been paid; or

(4) the comptroller reports to the executive director that the owner is not in good standing with the state or that the owner's application information does not agree with the comptroller's information. However, if the comptroller does not respond to the agency's request for verification within three business days in accordance with Texas Health and Safety Code, §374.102(f), the executive director shall not be prohibited from determining that the registration is administratively complete.

(b) Upon the executive director's determination that a submitted registration is administratively complete, a registration certificate will be issued for the dry cleaning facility or dry cleaning drop station, as applicable, as long as the executive director has no reason to deny the registration certificate under [~~subsection (f) of~~] this section. This certificate is necessary to receive the delivery of dry cleaning solvents

under §337.4(b) of this title (relating to General Prohibitions and Requirements).

(c) The agency's issuance of a registration certificate for a dry cleaning facility or dry cleaning drop station does not constitute agency certification or affirmation of the compliance status of the location in question with this chapter, the Texas Water Code, or the Texas Health and Safety Code; and this issuance does not preclude the agency from investigating these locations and pursuing enforcement actions when apparent violations are discovered.

(d) Certificate availability.

(1) The owner of a dry cleaning facility or dry cleaning drop station shall make available to a person delivering dry cleaning solvent a valid, current agency registration certificate for that establishment before the delivery of dry cleaning solvent can be made or accepted.

(2) The owner of the dry cleaning facility or drop station shall immediately display, upon request by agency staff, a valid, current agency registration certificate for that establishment.

(3) The dry cleaning facility or dry cleaning drop station owner shall ensure that a valid, current agency registration certificate is displayed at a facility or drop station. The original registration certificate must be posted in a public area where the document is clearly visible.

(4) In the event of the sale of a dry cleaning facility or a dry cleaning drop station, the previous owner's valid, current certificate may be used to purchase dry cleaning solvent for 30 days after the effective date of sale.

(e) Annual registration certificate renewal.

(1) The initial registration certificate issued for a dry cleaning facility or dry cleaning drop station will be valid until the expiration date indicated on that certificate. It is the responsibility of the owner to ensure that an application for renewal of that certificate is properly and timely submitted to the agency.

(2) A registration certificate is renewed by timely and proper submission of a new registration form to the agency. The agency will not issue a new registration certificate for registration forms that are determined by the executive director to be incomplete or inaccurate.

(3) A new registration form must be completed by the owner of a dry cleaning facility or dry cleaning drop station and submitted to the agency by August 1st of each year.

(f) Revocation or denial of a certificate by the executive director.

(1) The executive director may revoke or deny issuance of a certificate [~~if~~]:

(A) if the certificate was acquired by fraud, misrepresentation, or knowing failure to disclose material information; [~~or~~]

(B) if the owner of a dry cleaning facility or dry cleaning drop station is in violation of any of the requirements of this chapter or Texas Health and Safety Code, Chapter 374; or

(C) for any reason the executive director determines constitutes good cause for denial or revocation.

(2) Prior to revocation or denial of a certificate pursuant to this subsection, the executive director shall provide notice to the owner of the dry cleaning facility or dry cleaning drop station of the facts alleged to warrant revocation or denial. The notice must be in writing and sent via certified mail, return receipt requested. If the certified mail is returned to the executive director as unclaimed, notice is presumed to be received by the owner five days after mailing when:

(A) the notice was sent to the address indicated on the owner's most current registration; and

(B) the notice was sent simultaneously via first class mail, postage paid.

(3) The owner shall have 30 days after receipt of notice to demonstrate to the executive director whether or not compliance has been maintained with all requirements of law for the retention of the certificate. The executive director shall make a determination whether to revoke or deny the certificate and shall provide such determination in writing to the owner.

(4) The owner may appeal for commission review of the executive director's determination to revoke or deny a certificate pursuant to this subsection. An appeal must be in writing and filed by United States mail, facsimile, or hand delivery with the commission's Office of the Chief Clerk no later than 23 days after the date the agency mails notice of the executive director's determination to revoke or deny a certificate. The original and 11 copies of the appeal must be filed. If the appeal is filed by facsimile, the owner must file with the Office of the Chief Clerk the original and 11 copies by mail or hand delivery within three days. If an appeal meeting the requirements of this subsection is not filed within the time period specified, the executive director's determination is final.

(A) In addition to filing the appeal with the Office of the Chief Clerk, the owner shall mail or deliver a copy of the appeal to:

(i) the executive director; and

(ii) the Office of the Public Interest Counsel.

(B) An appeal filed under this subsection [~~section~~] must:

(i) provide a copy of the owner's registration information;

(ii) specify the executive director determination for which commission review is being sought;

(iii) request commission consideration of the executive director determination; and

(iv) explain the basis for the appeal.

(C) A proceeding based upon an appeal filed under this subsection [~~section~~] is not a contested case for purposes of Texas Government Code, Chapter 2001.

(g) In addition to subsection (f) of this section, the executive director may seek to revoke a certificate by filing a petition in accordance with the procedures set forth in Chapter 70 of this title (relating to Enforcement) if the executive director determines that any of the reasons in subsection (f)(1) of this section exist.

(h) Revocation of a certificate under subsection (f) or (g) of this section is cumulative of any other remedies available to the agency by law.

§337.13. Distributor Registration Certificate.

(a) Completion of the dry cleaning solvent distributor report form. Upon the executive director's determination that a submitted dry cleaning solvent distributor report form has been completed in accordance with this chapter and that all fees, penalties, and interest owed to the agency have been paid, a distributor registration certificate will be issued for the place of business covered by that registration. This

certificate is necessary for the delivery of dry cleaning solvent under §337.4 of this title (relating to General Prohibitions and Requirements).

(b) Incomplete or inaccurate dry cleaning solvent distributor report form or nonpayment. The executive director will not issue a distributor registration certificate for dry cleaning solvent distributor report forms determined by the executive director to be incomplete or inaccurate (including illegible or unclear information) or if any fees, penalties, or interest are owed to the agency. In order for a form to be complete, the form must contain all requested information with clear, legible, and true responses.

(c) Issuance of a registration certificate. The executive director's issuance of a registration certificate for a distributor does not constitute agency certification or affirmation of the compliance status of a location with this chapter, the Texas Water Code, or the Texas Health and Safety Code; or preclude the agency from investigating a location and pursuing enforcement action when apparent violations are discovered.

(d) Registration certificate availability.

(1) Prior to delivery of any dry cleaning solvent, a distributor shall make available to a person purchasing dry cleaning solvent a valid, current agency distributor registration certificate, or a legible copy of the certificate.

(2) A distributor shall immediately display, upon request by agency staff a valid, current agency registration certificate for a place of business.

(3) A distributor shall display the original agency registration certificate at the place of business. The original registration certificate must be posted in a public area where the certificate is clearly visible.

(e) Revocation or denial of certificate by the executive director.

(1) The executive director may revoke or deny issuance of a certificate [~~if~~]:

(A) if the certificate was acquired by fraud, misrepresentation, or knowing failure to disclose material information; [~~or~~]

(B) if the distributor is in violation of any of the requirements of this chapter or Texas Health and Safety Code, Chapter 374, including late remittance of solvent fees and non-remittance of solvent fees; or[~~.~~]

(C) for any reason the executive director determines constitutes good cause for denial or revocation.

(2) Prior to the revocation or denial of a certificate in accordance with subsection, the executive director shall provide notice to the distributor of the facts alleged to warrant revocation or denial. The notice must be in writing and sent via certified mail, return receipt requested. If the certified mail is returned to the executive director as unclaimed, notice is presumed to be received by the distributor five days after mailing when:

(A) the notice was sent to the address indicated on the distributor's most current registration; and

(B) the notice was sent simultaneously via first class mail, postage paid.

(3) The distributor shall have 30 days after receipt of notice to demonstrate to the executive director whether or not compliance has been maintained with all requirements of law for the retention of the certificate. The executive director shall make a determination whether to revoke or deny the certificate and shall provide such determination in writing to the distributor.

(4) The distributor may appeal for commission review of the executive director's determination to revoke or deny a certificate pursuant to this subsection. An appeal must be in writing and filed by United States mail, facsimile, or hand delivery with the commission's Office of the Chief Clerk no later than 23 days after the date the agency mails notice of the executive director's determination to revoke or deny a certificate. The original and 11 copies of the appeal must be filed. If the appeal is filed by facsimile, the distributor must file with the Office of the Chief Clerk the original and 11 copies by mail or hand delivery within three days. If an appeal meeting the requirements of this subsection is not filed within the time period specified, the executive director's determination is final.

(A) In addition to filing the appeal with the Office of the Chief Clerk, the distributor [~~owner~~] shall mail or deliver a copy of the appeal to:

(i) the executive director; and

(ii) the Office of the Public Interest Counsel.

(B) An appeal filed under this subsection [~~section~~] must:

(i) provide a copy of the distributor's registration information;

(ii) specify the executive director determination for which commission review is being sought;

(iii) request commission consideration of the executive director determination; and

(iv) explain the basis for the appeal.

(C) A proceeding based upon an appeal filed under this subsection [~~section~~] is not a contested case for purposes of Texas Government Code, Chapter 2001

(f) In addition to subsection (e) of this section, the executive director may seek to revoke a certificate by filing a petition in accordance with the procedures set forth in Chapter 70 of this title (relating to Enforcement) if the executive director determines that any of the reasons in subsection (e)(1) of this section exist.

(g) Revocation of a certificate under subsection (e) or (f) of this section is cumulative of any other remedies available to the agency by law.

§337.14. Registration Fees for Dry Cleaning Facilities and Drop Stations.

(a) Except for registration fees payable for operations conducted before September 1, 2005, each owner of an operating dry cleaning facility or dry cleaning drop station shall pay the registration fees set forth in Texas Health and Safety Code, §374.102. The owner of the dry cleaning facility or dry cleaning drop station on or after September 1 of each state fiscal year is responsible for the registration fees owed for the state fiscal year beginning on September 1. However, if a person acquires a dry cleaning facility or dry cleaning drop station that does not have a current registration certificate, the facility or drop station would have to be registered and the fee paid before a current registration certificate would be issued.

(b) Registration fees payable for operation of a facility or drop station before September 1, 2005, will be assessed and payable at the rates in effect before September 1, 2005.

(c) The annual registration fee may be divided into quarterly payments and billed on dates established by the executive director.

Payment in full [~~of registration fees~~] is due within 30 days of the agency invoice date. The fees must be paid by check, certified check, money order, or electronic funds transfer made payable to the "Texas Commission on Environmental Quality."

(d) The registration certificate will not be issued until registration fees, penalties, and interest assessed are paid in full.

(e) Owners that fail to pay registration fees when due shall pay penalties and interest in accordance with Chapter 12 of this title (relating to Payment of Fees).

§337.16. Registration by Property Owner or Preceding Property Owner.

(a) Registration.

(1) To be eligible to participate in Dry Cleaning Facility Release Fund benefits, a property owner or preceding property owner must register with the agency in accordance with this section.

(2) Prior to applying for corrective action at a site under the Dry Cleaning Facility Release Fund, a property owner or preceding property owner must register the site in accordance with subsection (c) of this section and hold a registration certificate in accordance with §337.17 of this title (relating to Property Owner or Preceding Property Owner Registration Certificate).

(3) Registration under this section is due by December 31, 2007. In order to register a site after December 31, 2007, a property owner or preceding property owner must first pay all past annual registration fees and any late fees due pursuant to Texas Health and Safety Code, §374.1022(c).

(4) A property owner or preceding property owner who registers a site under this section is responsible for compliance with the registration requirements of this section. A property owner or preceding property owner may designate a legally authorized representative to complete and submit the required registration information. However, the property owner or preceding property owner remains responsible for compliance with the provisions of this section by such representative.

(5) All sites registered under this section are subject to the fee and payment requirements of §337.18 of this title (relating to Registration Fees for Property Owners and Preceding Property Owners).

(b) Changes or additional information.

(1) Once a site is registered under this section, the property owner or preceding property owner shall provide written notice to the executive director of any changes or additional information concerning the site. Types of changes or additional information subject to this requirement include the following:

(A) change in owner or change in owner information (e.g. legally authorized representative, mailing address, or telephone number);

(B) change in site information (e.g. address or telephone number); and

(C) change in location of records for the site.

(2) Notice of any change or additional information must be submitted on the appropriate agency form that has been completed in accordance with this section. The agency's registration numbers for the site must be included in the appropriate spaces on the form.

(3) Notice of any change or additional information must be submitted to the agency within 30 days from the date of the occurrence of the change or addition.

(c) Required form for providing site registration information.

(1) A property owner or preceding property owner submitting registration information to the executive director shall provide the required information on the current agency registration form.

(2) The property owner or preceding property owner is responsible for ensuring that the registration form is fully complete and accurate. The form must be dated and signed by the property owner or preceding property owner or a legally authorized representative, and must be submitted to the executive director prior to applying for corrective action under the Dry Cleaning Facility Release Fund.

(3) The property owner or preceding property owner shall complete and submit a separate registration form for each site.

(4) If additional information, drawings, or other documents are submitted with new or revised registration data, specific site identification information (including the site registration number) must be conspicuously indicated on each document, and all such documents must be attached to and submitted with the form.

(5) When any of the required registration information submitted to the executive director is determined to be incomplete or inaccurate (including illegible or unclear information), the executive director may require the property owner or preceding property owner to submit additional information. A property owner or preceding property owner shall submit any required additional information within 30 days of receipt of such request.

§337.17. Property Owner or Preceding Property Owner Registration Certificate.

(a) Before the executive director evaluates a registration to determine if a registration certificate should be issued, each registration must be administratively complete. A registration is not administratively complete if:

(1) the registration form has not been completed and submitted to the agency in accordance with this chapter;

(2) the registration form does not contain all requested information with clear, legible, and true responses; or

(3) all fees, penalties, and interest owed to the agency have not been paid.

(b) Upon the executive director's determination that a submitted registration is administratively complete, a registration certificate will be issued to the property owner or preceding property owner, as applicable, for the site covered by the registration form, as long as the executive director has no reason to deny the registration certificate under this section. This certificate is necessary for a property owner or preceding property owner to apply for corrective action under the Dry Cleaning Facility Release Fund.

(c) A property owner or preceding property owner shall immediately display, upon request by agency staff, a valid agency registration certificate for a property.

(d) Revocation or denial of certificate by the executive director.

(1) The executive director may revoke or deny issuance of a certificate:

(A) if the certificate was acquired by fraud, misrepresentation, or knowing failure to disclose material information;

(B) if the property owner or preceding property owner is in violation of any of the requirements of this chapter or Texas Health and Safety Code, Chapter 374, including late remittance and non-remittance of fees; or

(C) for any reason the executive director determines constitutes good cause for denial or revocation.

(2) Prior to the revocation or denial of a certificate pursuant to this subsection, the executive director shall provide notice to the property owner or preceding property owner of the facts alleged to warrant revocation or denial. The notice must be in writing and sent via certified mail, return receipt requested. If the certified mail is returned to the executive director as unclaimed, notice is presumed to be received by the property owner or preceding property owner five days after mailing when:

(A) the notice was sent to the address indicated on the property owner or preceding property owner's most current registration; and

(B) the notice was sent simultaneously via first class mail, postage paid.

(3) The property owner or preceding property owner shall have 30 days after receipt of notice to demonstrate to the executive director whether or not compliance has been maintained with all requirements of law for the retention of the certificate. The executive director shall make a determination whether to revoke or deny the certificate and shall provide such determination in writing to the property owner or preceding property owner.

(4) The property owner or preceding property owner may appeal for commission review of the executive director's determination to revoke or deny a certificate pursuant to this subsection. An appeal must be in writing and filed by United States mail, facsimile, or hand delivery with the commission's Office of the Chief Clerk no later than 23 days after the date the agency mails notice of the executive director's determination to revoke or deny a certificate. The original and 11 copies of the appeal must be filed. If the appeal is filed by facsimile, the property owner or preceding property owner must file with the Office of the Chief Clerk the original and 11 copies by mail or hand delivery within three days. If an appeal meeting the requirements of this subsection is not filed within the time period specified, the executive director's determination is final.

(A) In addition to filing the appeal with the Office of the Chief Clerk, the property owner or preceding property owner shall mail or deliver a copy of the appeal to:

(i) the executive director; and

(ii) the Office of the Public Interest Counsel.

(B) The appeal filed under this subsection must:

(i) include a copy of the property owner or preceding property owner's registration information;

(ii) specify the executive director determination for which commission review is being sought;

(iii) request commission consideration of the executive director determination; and

(iv) explain the basis for the appeal.

(C) A proceeding based upon an appeal filed under this subsection is not a contested case for purposes of Texas Government Code, Chapter 2001.

(e) In addition to subsection (d) of this section, the executive director may seek to revoke a certificate by filing a petition in accordance with the procedures set forth in Chapter 70 of this title (relating to Enforcement) if the executive director determines that any of the reasons in subsection (d)(1) of this section exist.

(f) Revocation of a certificate under subsection (d) or (e) of this section is cumulative of any other remedies available to the agency by law.

§337.18. Registration Fees for Property Owners and Preceding Property Owners.

(a) A property owner or preceding property owner who registers a site pursuant to §337.16 of this title (relating to Registration by Property Owner or Preceding Property Owner) shall pay the annual registration fee and any applicable past annual registration fees and late fees set forth in Texas Health and Safety Code (THSC), §374.1022 for each registered site.

(b) The annual registration fee may be divided into quarterly payments and billed on dates established by the executive director. A property owner or preceding property owner who registers a site pursuant to §337.16 of this title on or after the first day of a billing quarter is responsible for the registration fee due for the entire billing quarter.

(c) Past annual registration fees and late fees must be paid in full at the time of registration and may not be divided into quarterly payments.

(d) Payment in full is due within 30 days of the agency invoice date. The fees must be paid by check, certified check, money order, or electronic funds transfer made payable to the "Texas Commission on Environmental Quality."

(e) The registration certificate will not be issued until all registration fees and any late fees due pursuant to THSC, §374.1022, in addition to any penalties and interest assessed, are paid in full.

(f) Property owners or preceding property owners who fail to pay registration fees when due shall pay penalties and interest in accordance with Chapter 12 of this title (relating to Payment of Fees).

(g) A property owner or preceding property owner who has registered a site pursuant to §337.16 of this title must continue to pay annual registration fees in accordance with THSC, §374.1022 for the duration of corrective action at the site under the Dry Cleaning Facility Release Fund.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800615
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 239-6091

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SUBCHAPTER D. PRIORITIZATION AND RANKING

30 TAC §337.31, §337.32

STATUTORY AUTHORITY

The amended sections are proposed under the authority granted to the commission by the Texas Legislature in Texas Health and Safety Code (THSC), Chapter 374. The amended sections are also proposed under Texas Water Code (TWC), §5.103, which

authorizes the commission to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and the THSC; TWC, §26.011, which provides the commission the powers necessary or convenient to carry out its responsibilities; THSC, §361.017, which provides the commission the powers necessary or convenient to carry out its responsibilities under the Solid Waste Disposal Act (SWDA); THSC, §361.024, which authorizes the commission to adopt rules consistent with the SWDA and establish minimum standards of operation for the management and control of solid waste; and House Bill 3220, 80th Legislature, 2007.

The proposed amended sections implement THSC, Chapter 374.

§337.31. Ranking of Sites.

(a) Dry cleaning site ranking system.

(1) The dry cleaning site ranking system is a methodology designed to determine a numerical score for a facility based on the executive director's judgment regarding various factors that may impact human health or the environment.

(2) The executive director will rank dry cleaning sites based on information provided in an application for ranking package. An application for ranking will be accepted from persons eligible to apply for a site to be ranked under Texas Health and Safety Code, §374.154(b)[~~, including former owners of dry cleaning facilities and owners of real property on which a dry cleaning facility was formerly located that meet the eligibility criteria~~].

(3) An application for ranking package must contain:

(A) a completed application for ranking;

(B) proof that an owner of the real property has been notified of the application if the applicant is not an owner of the real property;

(C) proof that a lessee has been notified of the application if the applicant is an owner of the real property and the facility is leased;

(D) evidence that the deductible has been met in accordance with Subchapter E of this chapter (relating to Deductible);

(E) laboratory analyses of at least one groundwater sample (soil analyses may be substituted with written approval of the executive director);

(F) geologic well log(s) from a monitoring or supply well or hydrogeologic information from the contaminated site where the groundwater or soil sample was taken;

(G) field survey to locate potential receptors, including water wells and surface waters to at least 500 feet beyond the boundary of the property;

(H) a records survey to identify all water wells and surface water bodies within 1/2 mile of the boundary of the property;

(I) a full operational history of the facility including types of solvent currently and previously used; and

(J) any other information or evidence the executive director considers necessary.

(4) Application for ranking packages that are not administratively and technically complete as determined by the executive director will not be ranked. The executive director will notify the applicant in writing of such a determination.

(5) Factors the executive director may consider in ranking sites include:

(A) types of solvent currently in use;

(B) types of solvent used in the past;

(C) operational history of the facility;

(D) risk to drinking water supplies;

(E) surface water:

(i) demonstrated impact to surface water;

(ii) distance to surface water; and

(iii) probability of contamination;

(F) groundwater:

(i) aquifer impacted;

(ii) depth to groundwater;

(iii) distance to nearest known groundwater wells;

(iv) areal extent of groundwater contaminated;

(v) subsurface geology as it affects contamination migration;

(vi) concentrations of dry cleaning solvent in the groundwater;

(vii) probability of contamination; and

(viii) institutional controls prohibiting the use of groundwater for potable purposes;

(G) alternative water source availability;

(H) soil:

(i) soil type;

(ii) depth to groundwater;

(iii) depth of contamination;

(iv) concentrations of dry cleaning solvent in the soil;

(v) quantity of soil contaminated;

(vi) potential for exposure to the contaminated soils; and

(vii) soil on the outcrop of a major or minor aquifer, or the Edwards Aquifer recharge or transition zone;

(I) current and future land use; and

(J) air contamination:

(i) potential for exposure to vapors; and

(ii) potential for vapors to migrate into buildings or other receptors.

(6) For all applications that are technically and administratively complete, the executive director will rank the site and notify an applicant of the relative ranking assigned to the applicant's site on or before the 90th day after the date the application is received by the executive director.

(7) If a site has already been ranked by the executive director, an applicant may submit an updated application for ranking to reflect changes in site conditions as a result of corrective action or other

circumstances. Such updates will be limited to one per site per state fiscal year.

(8) The executive director may re-rank sites where corrective action has occurred using monies from the Dry Cleaning Facility Release Fund to reflect changes in site conditions as a result of corrective action or other circumstances.

(b) Even if a site has been ranked, a person may take corrective action at the person's own expense at any time in accordance with commission rules. The resulting expenses will not be reimbursed by the commission. In addition to any other notice required, an applicant shall give the executive director notice of such corrective action within 30 days after the action is completed.

§337.32. Denial and Removal of Sites from Ranking.

(a) The executive director may deny or remove from ranking a site if:

(1) the owner of the dry cleaning facility or dry cleaning drop station is held responsible for the costs of corrective action under Texas Health and Safety Code, §374.202;

(2) the applicant denies access or unreasonably hinders or delays corrective action at the site;

(3) the applicant has failed to pay fees, penalties, and interest [~~for any dry cleaning facility or dry cleaning drop station~~] that the applicant is required to pay pursuant to this chapter;

(4) the applicant has failed to register any dry cleaning facility or dry cleaning drop station that the applicant was required to register; or

(5) the applicant does not pay the deductible or provide satisfactory proof of expenditures to apply against the deductible in accordance with Subchapter E of this chapter (relating to Deductible) within the required time frames.

(b) An applicant who has been denied or removed from ranking may address the cause for denial or removal from ranking, provide additional information, and reapply for ranking.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800616
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 239-6091

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SUBCHAPTER F. CORRECTIVE ACTION

30 TAC §§337.51 - 337.53

STATUTORY AUTHORITY

The amended and new sections are proposed under the authority granted to the commission by the Texas Legislature in Texas Health and Safety Code (THSC), Chapter 374. The amended and new sections are also proposed under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and the THSC; TWC, §26.011, which provides the commission the powers necessary or convenient to carry out its responsibilities; THSC, §361.017, which provides the commission the powers necessary or convenient to carry out its responsibilities under the Solid Waste Disposal Act (SWDA); THSC, §361.024, which authorizes the commission to adopt rules consistent with the SWDA and establish minimum standards of operation for the management and control of solid waste; and House Bill 3220, 80th Legislature, 2007.

The proposed amended and new sections implement THSC, Chapter 374.

§337.51. Eligibility for Corrective Action.

An owner or other person is eligible to have corrective action costs paid by the Dry Cleaning Facility Release Fund if:

(1) the owner or other person is eligible to apply for a site to be ranked under §337.31(a)(2) of this title (relating to Ranking of Sites);

(2) an application for ranking package under §337.31(a)(3) of this title has been properly submitted to, and accepted by, the executive director as administratively and technically complete;

(3) the owner or other person is not currently in violation of this chapter [~~for any dry cleaning facilities or dry cleaning drop station that the person owns~~]; and

(4) the owner or other person is not otherwise ineligible for corrective action under this chapter or Texas Health and Safety Code, Chapter 374.

§337.52. Deed Notice of Site Restrictions After Corrective Action.

Following the completion of corrective action under this chapter, a written notice will be filed in the real property records of the county or counties in which the site is located to notify future property owners that, pursuant to Texas Health and Safety Code, §374.1535, perchloroethylene may not be used at that site.

§337.53. Withdrawal of Site from the Dry Cleaner Remediation Program.

(a) Once corrective action costs have been incurred at a site by the Dry Cleaner Remediation Program (the commission program that administers the Dry Cleaning Facility Release Fund), an applicant may not withdraw the site from the Dry Cleaner Remediation Program prior to completion of corrective action at the site.

(b) Notwithstanding subsection (a) of this section, in the event that corrective action has been suspended, postponed, or terminated at a site pursuant to §337.30 of this title (relating to Prioritization of Sites) or §337.50 of this title (relating to Corrective Action), an applicant may request to withdraw the site from the Dry Cleaner Remediation Program. An applicant may withdraw a site pursuant to this subsection only upon the express approval of the executive director.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800617

Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 239-6091

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SUBCHAPTER G. NON-PERCHLOROETHYLENE USERS, FACILITIES, AND DROP STATIONS

30 TAC §337.64

STATUTORY AUTHORITY

This new section is proposed under the authority granted to the commission by the Texas Legislature in Texas Health and Safety Code (THSC), Chapter 374. This new section is also proposed under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and the THSC; TWC, §26.011, which provides the commission the powers necessary or convenient to carry out its responsibilities; THSC, §361.017, which provides the commission the powers necessary or convenient to carry out its responsibilities under the Solid Waste Disposal Act (SWDA); THSC, §361.024, which authorizes the commission to adopt rules consistent with the SWDA and establish minimum standards of operation for the management and control of solid waste; and House Bill 3220, 80th Legislature, 2007.

The proposed new section implements THSC, Chapter 374.

§337.64. Retaining Nonparticipating Status for a Drop Station Moved to a New Location.

(a) To retain the nonparticipating status of a drop station when that drop station is moved to a new location, the owner of the drop station must:

(1) Hold a current nonparticipating non-perchloroethylene user registration certificate for the drop station pursuant to §337.61 of this title (relating to Nonparticipating Non-Perchloroethylene User Registration Certificate);

(2) Submit updated registration information for the drop station pursuant to §337.10 of this title (relating to Registration for Dry Cleaning Facilities and Drop Stations);

(3) Continue to meet all requirements of Texas Health and Safety Code, §374.104 and of this subchapter; and

(4) Swear in an affidavit approved by the executive director that:

(A) the dry cleaning solvent perchloroethylene has never been used at the new location to which the nonparticipating non-perchloroethylene user registration certificate would now apply; and

(B) the owner will not now or ever use or allow the use of perchloroethylene at the new location to which the nonparticipating non-perchloroethylene user registration certificate would now apply.

(b) All provisions of this subchapter apply to any new drop station location that retains its nonparticipating status pursuant to this section.

(c) A nonparticipating non-perchloroethylene user registration certificate issued pursuant to §337.61 of this title may only apply to one drop station location at a time.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800618
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 239-6091

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 20. TEXAS PROCUREMENT AND SUPPORT SERVICES

SUBCHAPTER C. PROCUREMENT

34 TAC §20.52

The Comptroller of Public Accounts (comptroller) proposes an amendment to §20.52, concerning advisory committees. This section is being amended to implement House Bill 3560, 80th Legislature Session, 2007, and Government Code, §§2155.080, 2155.081, and 2110.005.

House Bill 3560, §1.06, transferred procurement duties of the former Texas Building and Procurement Commission to the comptroller, including those duties in Government Code, Chapter 2155. Government Code, §2155.080, authorizes the comptroller to establish an advisory committee on procurement. The purpose of the advisory committee on procurement is to represent before the comptroller the state agency purchasing community and the political subdivisions that use the comptroller's purchasing services. Government Code, §2155.081, authorizes the comptroller to establish a vendor advisory committee. The purpose of the vendor advisory committee is to represent before the comptroller the vendor community, to provide information to vendors, and to obtain vendor input on state procurement practices. Government Code, §2110.005, requires a state agency that establishes an advisory committee to state in a rule the purpose and tasks of the committee and the manner in which the committee will report to the agency.

The comptroller is proposing an amendment to these rules to establish these committees as advisory committees to the comptroller, to clarify the purpose and tasks of these committees, and to clarify the comptroller's new role with respect to these committees.

Subsection (a) is being amended to clarify the role of the comptroller in establishing the advisory committees and the applicability of Government Code, Chapter 2110. Subsection (b) is being amended to clarify the functions of the committees, the role of the Director of Texas Procurement and Support Services

(TPASS), and the duration of the committees. Subsection (c) is being amended to clarify the purpose, tasks, and composition of the advisory committee on procurement. Subsection (d) is being amended to clarify the purpose, tasks, and composition of the vendor advisory committee.

John Heleman, Chief Revenue Estimator, has determined that, for the first five-year period the rule proposal will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that, for each year of the first five years the rule proposal is in effect, the public benefit anticipated as a result of enforcing the rule will be by consolidating certain state procurement and support services within the comptroller's office, complementing the comptroller's current state fiscal responsibilities. The proposed amendment would have no significant fiscal impact on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Skip W. Bartek, Texas Procurement and Support Services, Comptroller of Public Accounts, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Government Code, §2155.080 and §2155.081, which authorize the comptroller to establish the advisory committees; Government Code, §2110.005, which provides that a state agency that establishes an advisory committee shall adopt rules outlining the purpose and tasks of the committee; Government Code, §2152.003, which authorizes the Texas Building and Procurement Commission (and now the comptroller) to adopt rules to administer Subtitle D (State Purchasing and General Services) of Title 10, Government Code; House Bill 3560, §1.01 (amending Government Code, §2151.003), which provides that a statutory reference to the Texas Building and Procurement Commission means the comptroller in all circumstances except where the provision relates to state buildings, grounds or property, or as otherwise provided by law; and House Bill 3560, §1.06 (adding Government Code, §2155.0011) which provides that the powers and duties of the Texas Building and Procurement Commission under Government Code, Chapter 2155, are transferred to the comptroller.

The proposed amendment implements Government Code, §2155.080 and §2155.081.

§20.52. Advisory Committees.

(a) The comptroller establishes the[~~Director of the Procurement Division is delegated authority to establish~~] purchasing advisory committees as set forth in subsections (c) and (d) of this section. Advisory committees shall comply with applicable requirements of [~~the~~] Texas Government Code, Chapter 2110 relating to State Agency Advisory Committees. The Advisory Committee on Procurement shall also comply with specific statutory authority provided by Texas Government Code, §2155.080; and the Vendor Advisory Committee shall also comply with specific statutory authority provided by Texas Government Code, §2155.081.

(b) Advisory committees [~~An advisory committee~~] in subsections (c) and (d) of this section are authorized [~~required~~] to carry out the following functions:

(1) Establish their [~~its~~] own rules of operation.

(2) The Director of Texas [~~the~~] Procurement and Support Services (TPASS) [~~Division~~] shall establish the size of the advisory committee, with the approval of the comptroller.

(3) The chair of a purchasing advisory committee shall provide to the Director of TPASS [~~the Procurement Division~~], or his designee, an annual report of the committee's activities.

(4) Annually, the Director of TPASS [~~the Procurement Division~~], or his designee, shall evaluate the committee's work, usefulness, and the costs related to the committee's existence, including the cost of agency staff time spent in support of the committee's activities. The information developed in the evaluation shall be reported to the Legislative Budget Board biennially.

(5) Members of an advisory committee may not be reimbursed for expenses associated with conducting committee business, including travel expenses, unless otherwise authorized by the General Appropriations Act, Article IX, or approved by the Governor and the Legislative Budget Board.

(6) An advisory committee established by the comptroller [~~Director of the Procurement Division~~] shall be abolished on the fourth anniversary of the first meeting of the advisory committee,

(A) unless the comptroller acts [~~governing body of the advisory committee votes~~] to continue or re-establish the committee in existence, and

(B) unless a specific duration is prescribed by statute for the advisory committee to exist.

(7) If the comptroller acts [~~governing body of an advisory committee votes~~] to continue or re-establish the committee's existence, it shall continue to exist for an additional four year [~~until the fourth anniversary date of the first meeting of its new~~] term. Comptroller action to continue or re-establish a committee may include, without limitation, issuing a letter appointing or re-appointing committee members to an additional term.

(c) The Advisory Committee on Procurement shall be composed of officers or employees from the comptroller [~~commission~~], from state agencies, including institutions of higher education, and from political subdivisions who are invited by the comptroller [~~commission~~] to serve on the committee. The officers and employees who serve on the committee shall be experienced in public purchasing, public finance, or possess other appropriate expertise to serve on the committee. The purpose of the Advisory Committee on Procurement is to represent before the comptroller the state agency purchasing community and the political subdivisions that use the comptroller's purchasing services. The tasks of the committee are [~~shall be~~] to:

(1) provide a method for state agencies and political subdivisions to bring issues to the attention of the comptroller [~~commission~~];

(2) review issues brought forth by the comptroller [~~commission~~];

(3) develop and make recommendations on improvements to the procurement process;

(4) review and comment on findings and recommendations related to purchasing that are made by state agency internal auditors or by the state auditor;

(5) develop an assessment of the committee, committee goals and measurable objectives; and

(6) participate in an annual review of committee activities and make recommendations about the future direction of the committee at the end of each fiscal year.

(d) The Vendor Advisory Committee shall be composed of employees from the comptroller [~~commission~~] and vendors who have done business with the state, and who are invited by the comptroller

[~~commission~~] to serve on the committee. The comptroller [~~commission~~] shall invite a cross-section of the vendor community to serve on the committee, both large and small businesses and vendors who provide a variety of different goods and services to the state. The purpose of the Vendor Advisory Committee is to represent before the comptroller the vendor community, to provide information to vendors, and to obtain vendor input on state procurement practices. The tasks of the committee are [~~shall be~~] to:

[~~(1) represent the vendor community before the commission;~~]

[~~(2) serve as a channel for providing information to vendors;~~]

(1) [~~(3)~~] obtain vendor input and develop and make recommendations on improvements to the procurement process;

(2) [~~(4)~~] develop an assessment of the committee, committee goals and measurable objectives at the end of each fiscal year; and

(3) [~~(5)~~] participate in an annual review of the committee's activities and make recommendations about the future direction and continuance of the committee at the end of each fiscal year.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 4, 2008.

TRD-200800669
Martin Cherry
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 475-0387

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 13. TEXAS COMMISSION ON FIRE PROTECTION

CHAPTER 423. FIRE SUPPRESSION

The Texas Commission on Fire Protection (the Commission) proposes amendments to §423.203, Minimum Standards for Basic Aircraft Rescue Fire Fighting Personnel Certification; and §423.303, Minimum Standards for Basic Marine Fire Protection Personnel Certification. The purpose of the proposed amendments are to delete obsolete language referring to part-time certification for aircraft rescue firefighters and part-time certification for marine fire protection personnel. There is no longer any part-time certifications for fire protection personnel.

Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five-year period the proposed amendments are in effect there will be no fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each year of the first five years the proposed amendments are in effect, there will be no public benefit anticipated as a result of enforcing these amendments. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with these proposed amendments.

Comments regarding these proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us. Comments will be reviewed and discussed at a future Commission meeting.

SUBCHAPTER B. MINIMUM STANDARDS FOR AIRCRAFT RESCUE FIRE FIGHTING PERSONNEL

37 TAC §423.203

These amendments are proposed under Texas Government Code, §419.008, which provides the Commission with the authority to propose rules for the administration of its powers and duties.

Cross reference to statute: Texas Government Code, Chapter 419.

§423.203. Minimum Standards for Basic Aircraft Rescue Fire Fighting Personnel Certification.

(a) In order to obtain a Basic Aircraft Rescue Fire Fighting Personnel Certification the individual must:

(1) hold a Basic Structure Fire Protection Personnel Certification; and

(2) possess valid documentation of accreditation from the International Fire Service Accreditation Congress as an Airport Fire Fighter; or

(3) complete a Commission-approved aircraft rescue fire suppression training program and successfully pass the Commission examination as specified in Chapter 439 of this title (relating to Examinations for Certification). An approved aircraft rescue fire suppression training program shall consist of one of the following:

(A) a Commission-approved Basic Aircraft Rescue Fire Suppression Curriculum as specified in Chapter 2 of the Commission's Certification Curriculum Manual; or

(B) an out-of-state and/or military training program that has been submitted to the Commission for evaluation and found to be equivalent to or exceeds the Commission-approved Basic Aircraft Rescue Fire Suppression Curriculum; or

(b) A person who holds or is eligible to hold a certificate upon employment as a part-time aircraft rescue firefighter may be certified as an aircraft rescue fire fighting personnel, of the same level of certification, without meeting the applicable examination requirements.

[~~(c) If a person holds a current certification as a part-time aircraft rescue firefighter, the Texas Department of State Health Services Emergency Care Attendant Certification may be satisfied by documentation of equivalent training or certification in lieu of current certification by the Texas Department of State Health Services.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 30, 2008.

TRD-200800534
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 936-3813

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SUBCHAPTER C. MINIMUM STANDARDS FOR MARINE FIRE PROTECTION PERSONNEL

37 TAC §423.303

These amendments are proposed under Texas Government Code, §419.008, which provides the Commission with the authority to propose rules for the administration of its powers and duties.

Cross reference to statute: Texas Government Code, Chapter 419.

§423.303. Minimum Standards for Basic Marine Fire Protection Personnel Certification.

(a) In order to obtain a basic Marine Fire Protection Personnel Certification the individual must:

(1) hold a Basic Structure Fire Protection Personnel Certification:

(2) complete a training program specific to marine fire protection consisting of one of the following:

(A) complete the Commission-approved Basic Marine Fire Protection Curriculum as specified in Chapter 3, of the Commission's Certification Curriculum Manual.

(B) An out-of-state and/or military training program that has been submitted to the Commission for evaluation and found to be equivalent to or exceed the Commission-approved Basic Marine Fire Protection Curriculum; or

(3) successfully pass the Commission examination as specified in Chapter 439 of this title (relating to Examinations for Certification) prior to assignment.

(b) A person who holds, or is eligible to hold, a certificate upon employment as a part-time marine fire protection personnel may be certified as a marine fire protection personnel, of the same level of certification, without meeting the applicable examination requirements.

~~[(c) If a person holds a current certification as a part-time marine fire protection personnel, the Texas Department of State Health Services emergency care attendant certification may be satisfied by documentation of equivalent training or certification in lieu of current certification by the Texas Department of State Health Services.]~~

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 30, 2008.

TRD-200800535
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 936-3813

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CHAPTER 449. HEAD OF A FIRE DEPARTMENT

37 TAC §449.1

The Texas Commission on Fire Protection (the Commission) proposes amendments to §449.1, Minimum Standards for the Head of a Fire Department. The purpose of the proposed amendment is to clarify when an individual appointed as head of a department becomes eligible to be certified and the documentation that must be submitted verifying that eligibility.

Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five-year period the proposed amendments are in effect there will be no fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each year of the first five years the proposed amendments are in effect, there will be no public benefit anticipated as a result of enforcing these amendments. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with these proposed amendments.

Comments regarding these proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us. Comments will be reviewed and discussed at a future Commission meeting.

These amendments are proposed under Texas Government Code, §419.008, which provides the Commission with the authority to propose rules for the administration of its powers and duties.

Cross reference to statute: Texas Government Code, Chapter 419.

§449.1. Minimum Standards for the Head of a Fire Department.

(a) An individual who becomes employed and is assigned as the head of a fire department [~~, on or after March 1, 1999,~~] must be certified by the commission as head of a fire department, within one year of appointment.

(b) An individual appointed head of a department must be eligible to be certified at the time of appointment or will become eligible to be certified within one year of the appointment and must submit an affidavit verifying eligibility status at the time of the appointment if not holding a Commission certification.

(c) [~~(b)~~] Holding the head of a fire department certification does not qualify an individual for any other certification. An individual who seeks certification in another discipline must meet the requirements for that discipline.

(d) [~~(c)~~] Nothing contained in this chapter shall be construed to supercede Chapter 143, Local Government Code, in regard to appointment of a head of a fire department.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 30, 2008.

TRD-200800536
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 936-3813

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 15. TEXAS VETERANS COMMISSION

CHAPTER 452. ADMINISTRATION GENERAL PROVISIONS

40 TAC §452.7

The Texas Veterans Commission (commission) proposes new §452.7, concerning Commission Duties, which will be located in Title 40, Part 15, Chapter 452 of the Texas Administrative Code. The proposed new section establishes the policy for commission duties. The proposed new rule is required under House Bill 3426 and authorized under the Texas Government Code §434.010, granting the commission authority to adopt rules that it considers necessary for its administration.

Tina Coronado, General Counsel for the commission, has determined that for each year of the first five-year period that the new section is in effect there will be no increase in expenditures or revenue for state government and no fiscal impact for local government as a result of enforcing or administering the section.

Ms. Coronado has also determined that for the first five years the new rule is in effect, the public will benefit from the separation of policymaking and management responsibilities of the commission and management responsibilities of the director and staff. There will be no effect on individuals, or large, small, or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Ms. Coronado has also determined that for the first five-year period the proposed section is in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under the Administrative Procedure Act, §2001.022.

Comments on the proposed new section may be submitted to Tina Coronado, General Counsel, Texas Veterans Commission, 1700 North Congress Avenue, Austin, Texas 78701 or by fax to (512) 463-3288. Comments may also be submitted electronically to *tina.coronado@tvc.state.tx.us*. For comments submitted electronically, please include "Commission Duties" in the subject line. The deadline for submission of comments is 20 days from the date of publication of the proposed section in the *Texas Register*. Comments should be organized in a manner consistent with the organization of the section under consideration.

The new section is proposed under §434.010, which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure; and specifically, §2155.076 of the Texas Government Code which requires the commission to develop and adopt protest procedures for vendors concerning commission purchases.

No other statutes, articles, or codes are affected by this section.

§452.7. Commission Duties.

(a) The commission is composed of five members appointed by the governor, with advice and consent of the senate. The commission adopts rules for the agency, and employs and directs the executive director. The commissioners retain and exercise all authority and responsibility assigned to them by law that has not been delegated to the executive director.

(b) The executive director manages the day-to-day business of the commission, employs staff, and carries out other duties and responsibilities assigned by law or delegated by the commission.

(c) A delegation of authority to the executive director must be made by the commission in an open meeting. The commission may review, modify, or ratify a delegation at any open meeting. A change in membership of the commission does not void an existing delegation of authority; it remains in effect until another one is approved by a majority vote of the commission at an open meeting.

(d) All decisions of the commission shall be by majority vote of a quorum of commissioners present and voting.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 29, 2008.

TRD-200800483
Tina Coronado
General Counsel
Texas Veterans Commission
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 463-1981

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CHAPTER 456. CONTRACT NEGOTIATION AND MEDIATION

40 TAC §§456.1 - 456.17

The Texas Veterans Commission (commission) proposes new Chapter 456, §§456.1 - 456.17, regarding contract negotiation and mediation, which will be located in Title 40, Part 15, of the Texas Administrative Code. The proposed new chapter establishes the procedure for contract negotiation and mediation. The proposed new chapter is required under Texas Government Code Chapter 2260 and authorized under Texas Government Code §434.010, granting the commission authority to adopt rules that it considers necessary for its administration.

Tina Coronado, General Counsel for the commission, has determined that for each year of the first five-year period that the new sections are in effect there will be no increase in expenditures or revenue for state government and no fiscal impact for local government as a result of enforcing or administering the sections.

Ms. Coronado has also determined that for the first five years the new sections are in effect, the public will benefit from having set procedures for contract negotiation and dispute. There will be no effect on individuals, or large, small, or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Ms. Coronado has also determined that for the first five-year period the proposed sections are in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under the Administrative Procedure Act, §2001.022.

Comments on the proposed new sections may be submitted to Tina Coronado, General Counsel, Texas Veterans Commission, 1700 North Congress Avenue, Austin, Texas 78701 or by fax to (512) 463-3288. Comments may also be submitted electronically to *tina.coronado@tvc.state.tx.us*. For comments submitted electronically, please include "Contract Negotiation and Mediation" in the subject line. The deadline for submission of comments is 20 days from the date of publication of the proposed sections in the *Texas Register*. Comments should be organized in a manner consistent with the organization of the chapter under consideration.

The new sections are proposed under §434.010, which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure; and specifically, §2155.076 of the Texas Government Code which requires the commission to develop and adopt protest procedures for vendors concerning commission purchases.

No other statutes, articles, or codes are affected by these sections.

§456.1. Purpose.

Purpose. This chapter governs the negotiation and mediation of certain breach of contract claims asserted by contractors against the agency under Chapter 2260 of the Government Code.

§456.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meaning, unless the context clearly indicates otherwise:

(1) Agency--The Texas Veterans Commission.

(2) Claim--A written demand for damages by the contractor that is based upon the agency's alleged breach of the contract.

(3) Contract--A written contract between the agency and a contractor, under the terms of which the contractor agrees to either:

(A) provide goods or services, by sale or lease, to or for the agency; or

(B) perform a project as defined by Government Code, §2166.001.

(4) Contractor--Independent contractor who has entered into a contract directly with the agency. The term does not include:

(A) the contractor's subcontractor, officer, employee, agent, or other person who furnishes goods or services to the contractor;

(B) an employee of the agency; or

(C) a student at an institution of higher education.

(5) Counterclaim--A demand by the agency that is based upon the contractor's claim.

(6) Day--A calendar day. If an act is required to occur on a Saturday, Sunday, or holiday, then the next working day that is not one of these days is counted as the required day for the purpose of this act.

(7) Event--An act or omission, or a series of acts or omissions that give rise to a claim. The following list contains illustrative examples of events, subject to the specific terms of the contract:

(A) Examples of events in the context of a contract for goods or services:

(i) the failure of the agency to timely pay for the goods or services;

(ii) the failure of the agency to pay the balance due and owing on the contract price, including amounts that arose from orders for additional work, after deduction of any amount that is owed to the agency for work that has not been performed under the contract or in substantial compliance with the contract terms;

(iii) the suspension, cancellation, or termination of the contract;

(iv) final rejection wholly or partly of the goods or services that the contractor has tendered;

(v) repudiation of the entire contract prior to or at the outset of performance by the contractor;

(vi) withholding liquidated damages from final payment to the contractor.

(B) Examples of events in the context of a project:

(i) the failure of the agency to timely pay the unpaid balance of the contract price following final acceptance of the project;

(ii) the failure of the agency to make timely progress payments as required under the contract;

(iii) the failure of the agency to pay the balance that is due and owing on the contract price, including amounts that arose from orders for additional work, after deduction of any amount that is owed the agency for work that has not been performed under the contract or in substantial compliance with the contract terms;

(iv) the failure to grant time extensions to which the contractor is entitled under the terms of the contract;

(v) the failure to compensate the contractor for occurrences for which the contract provides a remedy;

(vi) suspension, cancellation or termination of the contract;

(vii) rejection by the agency, wholly or partly, of the "work," as defined under the contract, that the contractor has tendered;

(viii) repudiation of the entire contract prior to or at the outset of performance by the contractor;

(ix) withholding liquidated damages from final payment to the contractor;

(x) refusal, in whole or in part, of a written request that the contractor has made in compliance with the contract to adjust the contract price, the contract time, or the scope of work.

(C) The lists in subparagraphs (A) and (B) of this paragraph should not be considered exhaustive, but are merely illustrative in nature and do not expand the limits of Chapter 2260 of the Government Code.

(8) Goods--Supplies, materials or equipment.

(9) Parties--The contractor that has entered into a contract with the agency, in connection with which a claim of breach of contract has been filed under this chapter.

(10) Project--A building construction project as defined under Government Code, §2166.001, that is financed, wholly or partly, by a specific appropriation, bond issue, or federal money, including the construction of:

(A) a building, structure, or appurtenant facility or utility, including the acquisition and installation of original equipment and original furnishing; and

(B) an addition to, or alteration, modification, rehabilitation, or repair of, an existing building, structure, or appurtenant facility or utility.

(11) Services--The furnishing of skilled or unskilled labor, or of consulting or professional work, or a combination thereof, excluding the labor of an employee of the agency.

§456.3. Prerequisites to Suit.

The procedures that are contained in this chapter are exclusive and required prerequisites to suit under Civil Practice and Remedies Code, Chapter 107, and Government Code, Chapter 2260.

§456.4. Sovereign Immunity.

This chapter does not waive the agency's sovereign immunity to suit or liability.

§456.5. Notice of Claim of Breach of Contract.

(a) A contractor who asserts a claim of breach of contract under Government Code, Chapter 2260, must file a notice of the claim as provided under this section.

(b) The notice of claim shall:

(1) be written and signed by the contractor or the contractor's authorized representative;

(2) be delivered by hand, certified mail return receipt requested, or other verifiable delivery service, to the agency officer who is designated in the contract to receive a notice of claim of breach of contract under Government Code, Chapter 2260; if no person is designated in the contract, then the notice shall be delivered to the agency's chief administrative officer; and

(3) state in detail:

(A) the nature of the alleged breach of contract, including the date of the event that the contractor cites as the basis of the claim and each contractual provision that the contractor alleges has been breached;

(B) a description of damages that resulted from the alleged breach, including the amount and method that the contractor has used to calculate those damages; and

(C) the legal theory for recovery, including the causal relationship between the alleged breach and the damages that the contractor claims.

(c) In addition to the mandatory contents of the notice of claim that are required under subsection (b) of this section, the contractor may submit supporting documentation or other tangible evidence to facilitate the agency's evaluation of the contractor's claim.

(d) The notice of claim shall be delivered not later than 180 days after the date of the event that the contractor cites as the basis of the claim.

§456.6. Agency Counterclaim.

(a) To assert a counterclaim under Government Code, Chapter 2260, the agency shall file a notice of the counterclaim as provided under this section.

(b) The notice of counterclaim shall:

(1) be written;

(2) be delivered by hand, certified mail return receipt requested, or other verifiable delivery service to the contractor or representative of the contractor who signed the notice of claim of breach of contract; and

(3) state in detail:

(A) the nature of the counterclaim; and

(B) a description of the damages or offsets that the agency seeks, including the amount and method that the agency has used to calculate those damages or offsets; and

(C) the legal theory for recovery under the counterclaim.

(c) In addition to the mandatory contents of the notice of counterclaim that are required under subsection (b) of this section, the agency may submit documentation or other tangible evidence to aid the contractor's evaluation of the agency's counterclaim.

(d) The notice of counterclaim shall be delivered to the contractor not later than 90 days after the agency's receipt of the contractor's notice of claim.

(e) Nothing herein precludes the agency from initiation of a lawsuit for damages against the contractor.

§456.7. Duty to Negotiate.

The parties shall negotiate in accordance with the timetable set forth in §456.8 of this title (relating to Negotiation Timetable) to attempt to resolve all claims and counterclaims. No party is obligated to settle with the other party as a result of the negotiation.

§456.8. Negotiation Timetable.

(a) Following receipt of a contractor's notice of claim, the agency's chief administrative officer or his designee, shall review the contractor's claim and the agency's counterclaim, if any, and initiate negotiations with the contractor to attempt to resolve the claim and counterclaim.

(b) Subject to subsection (c) of this section, the parties shall begin negotiations within a reasonable period of time, not to exceed 60 calendar days following the later of:

(1) the date of termination of the contract;

(2) the completion date in the original contract; or

(3) the date the agency receives the contractor's notice of claim.

(c) The agency may delay negotiations until after the 180th day from the date of the event giving rise to the claim of breach of contract by delivering written notice to the contractor that the commencement of negotiations will be delayed and notice of when the agency will be ready to begin negotiations.

(d) The parties may conduct negotiations according to an agreed schedule as long as they complete the negotiations no later than 270 days after the agency receives the contractor's notice of claim.

(e) The parties may agree in writing on or before the 270th day after the agency receives the contractor's notice of claim to extend the time for negotiations. The agreement shall be signed by representatives of the parties with authority to bind each respective party and

shall provide for the extension of the statutory negotiation period until a date certain. The parties may enter into a series of written extension agreements that comply with the requirements of this section.

(f) The contractor may request a contested case hearing before the State Office of Administrative Hearings on or before the 270th day after the agency receives the contractor's notice of claim, or the expiration of any extension agreed to by the parties.

(g) The parties may agree to mediate the dispute at any time before the 270th day after the agency receives the contractor's notice of claim or before the expiration of any extension agreed to by the parties pursuant to subsection (e) of this section.

§456.9. Conduct of Negotiation.

(a) The negotiation may be conducted by any method, technique, or procedure authorized under the contract or agreed upon by the parties.

(b) To facilitate the meaningful evaluation and negotiation of the claim and any counterclaim, the parties may exchange relevant documents that support their respective claims, defenses, counterclaims or positions.

(c) Material submitted pursuant to this section and claimed to be confidential by the contractor shall be handled pursuant to the requirements of the Public Information Act, Government Code, Chapter 552.

§456.10. Settlement Approval Procedures.

The parties' settlement approval procedures shall be disclosed prior to, or at the beginning of, negotiations. To the extent possible, the parties shall select negotiators who are knowledgeable about the subject matter of the dispute, who are in a position to reach agreement, and who can credibly recommend approval of an agreement.

§456.11. Settlement Agreement.

(a) A settlement agreement may resolve an entire claim or any designated and severable portion of a claim.

(b) To be enforceable, a settlement agreement must be in writing and signed by representatives of the contractor and the agency who have authority to bind each respective party.

(c) A partial settlement does not waive a party's rights under the Government Code, Chapter 2260, as to the parts of the claim or counterclaim that are not resolved.

§456.12. Costs of Negotiation.

Unless the parties agree otherwise, each party shall be responsible for its own costs incurred in connection with a negotiation, including, without limitation, the costs of attorney's fees, consultant's fees, and expert's fees.

§456.13. Request for Contested Case Hearing.

(a) If a claim for breach of contract is not resolved in its entirety on or before the 270th day after the agency receives the notice of claim, or after the expiration of any extension, the contractor may file a request with the agency for a contested case hearing before State Office of Administrative Hearings (SOAH).

(b) A request for a contested case hearing shall state the legal and factual basis for the claim and shall be delivered to the agency's chief administrative officer, his designee, or the person designated in the contract to receive notice, within 30 days after the 270th day or the expiration of any agreed extensions.

(c) The agency shall forward the contractor's request for a contested case hearing to SOAH within thirty days after receipt of the request.

(d) The parties may agree to submit the case to SOAH before the 270th day after the notice of claim is received by the agency if they have achieved a partial resolution of the claim or if an impasse has been reached in the negotiations and proceeding to a contested case hearing would serve the interests of justice.

§456.14. Mediation of Contract Claims.

The contractor and the agency may agree to mediate the claim and counterclaim at any time.

§456.15. Conduct of Mediation.

(a) A mediator may not impose his or her own judgment on the issues for that of the parties. The mediator must be acceptable to both parties.

(b) The mediation is subject to the provisions of the Governmental Dispute Resolution Act, Government Code, Chapter 2009.

(c) To facilitate a meaningful opportunity for settlement, the parties shall, to the extent possible, select representatives who are knowledgeable about the dispute, who are in a position to reach agreement, or who can credibly recommend approval of an agreement.

§456.16. Costs of Mediation.

The costs of the mediator shall be divided equally between the parties. Unless the contractor and the agency agree otherwise, each party shall be responsible for its own costs incurred in connection with the mediation, including costs of document reproduction for documents requested by such party, attorney's fees, and consultant or expert fees.

§456.17. Settlement Agreement.

(a) A settlement agreement reached during, or as a result of mediation, that resolves an entire claim or any designated and severable portion of a claim shall be in writing and signed by representatives of the contractor and the agency who have authority to bind each respective party.

(b) If the settlement agreement does not resolve all issues raised by the claim and counterclaim, the agreement shall identify the issues that are not resolved.

(c) A partial settlement does not waive a contractor's rights under the Government Code, Chapter 2260, as to the parts of the claim that are not resolved.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 29, 2008.

TRD-200800484
Tina Coronado
General Counsel
Texas Veterans Commission
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 463-1981

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CHAPTER 457. PROTESTS OF AGENCY PURCHASES

40 TAC §457.1

The Texas Veterans Commission (commission) proposes new Chapter 457, §457.1, regarding protests of agency purchases,

which will be located in Title 40, Part 15, of the Texas Administrative Code. The proposed new section establishes the procedure for the protesting of agency purchases. The proposed section is required under Texas Government Code §2155.076 and authorized under §434.010 of the Texas Government Code, granting the commission authority to adopt rules that it considers necessary for its administration.

Tina Coronado, General Counsel for the commission, has determined that for each year of the first five-year period that the new section is in effect there will be no increase in expenditures or revenue for state government and no fiscal impact for local government as a result of enforcing or administering the section.

Ms. Coronado has also determined that for the first five years the new section is in effect, the public will benefit from having procedures set in place for protests of agency purchase. There will be no effect on individuals, or large, small, or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Ms. Coronado has also determined that for the first five-year period the proposed section is in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under the Administrative Procedure Act, §2001.022.

Comments on the proposed new section may be submitted to Tina Coronado, General Counsel, Texas Veterans Commission, 1700 North Congress Avenue, Austin, Texas 78701 or by fax to (512) 463-3288. Comments may also be submitted electronically to *tina.coronado@tvc.state.tx.us*. For comments submitted electronically, please include "Protests of Agency Purchases" in the subject line. The deadline for submission of comments is 20 days from the date of publication of the proposed section in the *Texas Register*. Comments should be organized in a manner consistent with the organization of the section under consideration.

The new section is proposed under §434.010, which provides the Texas Veterans Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure; and specifically, §2155.076 of the Texas Government Code which requires the commission to develop and adopt protest procedures for vendors concerning commission purchases.

No other statutes, articles, or codes are affected by this section.

§457.1. Protests.

(a) The following words and terms, when used in this chapter, shall have the following meaning unless the context clearly indicates otherwise.

(1) Agency--The Texas Veterans Commission.

(2) Commissioners--Commissioners of the Texas Veterans Commission.

(3) Interested parties--All vendors who have submitted bids or proposals for the provision of goods or services pursuant to a contract with the agency.

(b) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation, evaluation, or award of a contract may formally protest to the Director of Finance. Such protests must be in writing and received in the finance director's office within 10 working days after such aggrieved person knows, or should have known, of the occurrence of the action which is protested. Formal protests must conform to the requirements of this subsection and subsection (c) of this section, and shall be resolved in accordance with the procedure set forth in subsections (d) and (e) of this section. Copies of the protest must be mailed or delivered by the protesting party to the agency and other interested parties.

(c) In the event of a timely protest or appeal under this section, the agency shall not proceed further with the solicitation or with the award of the contract unless the Executive Director, after consultation with the Director of Finance, makes a written determination that the award of contract without delay is necessary to protect the best interests of the state.

(d) A formal protest must be sworn and contain:

(1) a specific identification of the statutory or regulatory provision(s) that the protesting party alleges has been violated;

(2) a specific description of each action by the agency that the protesting party alleges to be a violation of the statutory or regulatory provision(s) that the protesting party has identified pursuant to paragraph (1) of this subsection;

(3) a precise statement of the relevant facts;

(4) a statement of any issues of law or fact that the protesting party contends must be resolved;

(5) a statement of the argument and authorities that the protesting party offers in support of the protest; and

(6) a statement that copies of the protest have been mailed or delivered to the agency and all other identifiable interested parties.

(e) The Director of Finance shall have the authority, prior to appeal to the Executive Director of the commission, to settle and resolve the dispute concerning the solicitation or award of a contract. The Director of Finance may solicit written responses to the protest from other interested parties.

(f) If the protest is not resolved by mutual agreement, the Director of Finance will issue a written determination on the protest.

(1) If the Director of Finance determines that no violation of rules or statutes has occurred, he/she shall so inform the protesting party and other interested parties by letter which sets forth the reasons for the determination.

(2) If the Director of Finance determines that a violation of the rules or statutes has occurred in a case where a contract has not been awarded, he/she shall so inform the protesting party and other interested parties by letter which sets forth the reasons for the determination and the appropriate remedial action.

(3) If the Director of Finance determines that a violation of the rules or statutes has occurred in a case where a contract has been awarded, he/she shall so inform the protesting party and other interested parties by letter which sets forth the reasons for the determination, which may include ordering the contract void.

(g) The Director of Finance's determination on a protest may be appealed by the protesting party to the Executive Director of the agency. An appeal of the Director of Finance's determination must be in writing and must be received in the Executive Director's office no later than 10 working days after the date of the Director of Finance's determination. Copies of the appeal must be mailed or delivered by the protesting party and other interested parties. The appeal must include a certified statement that such copies have been provided. The appeal shall be limited to review of the Director of Finance's determination.

(h) The Executive Director may confer with the General Counsel in his/her review of the matter appealed. The Executive Director may, in his/her discretion, refer the matter to the Commissioners for

their consideration at a regularly scheduled open meeting or issue a written decision on the protest.

(i) When a protest has been appealed to the Executive Director under subsection (f) of this section and has been referred to the Commissioners by the Executive Director under subsection (g) of this section, the following requirements shall apply:

(1) Copies of the appeal and responses of interested parties, if any, shall be mailed to the Commissioners.

(2) All interested parties who wish to make an oral presentation at the open meeting are requested to notify the Commission's General Counsel at least 48 hours in advance of the open meeting.

(3) The Commissioners may consider oral presentations and written documents presented by staff and interested parties. The Chairman shall set the order and amount of time allowed for presentations.

(4) The Commissioners' determination of the appeal shall be by duly adopted resolution reflected in the minutes of the open meeting, and shall be final.

(j) A protest or appeal that is not filed timely will not be considered, unless good cause for delay is shown or the commission determines that a protest or appeal raises issues significant to procurement practices or procedures.

(k) A decision issued either by the Commissioners in open meeting, or in writing by the Executive Director, shall be the final administrative action of the agency.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 29, 2008.

TRD-200800485
Tina Coronado
General Counsel
Texas Veterans Commission
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 463-1981

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CHAPTER 458. STATUTORY ADVISORY COMMITTEES

40 TAC §458.1

The Texas Veterans Commission (commission) proposes new Chapter 458, §458.1, concerning Veterans Employment and Training Advisory Committee, which will be located in Title 40, Part 15, of the Texas Administrative Code. The proposed new section is authorized under Texas Government Code §434.0101, granting the commission the authority to establish advisory committees for the development of rules or policies. Texas Government Code §2110.005 requires an agency that establishes an advisory committee to adopt rules for the establishment of those committees.

Tina Coronado, General Counsel for the commission, has determined that for each year of the first five-year period that the new section is in effect there will be no increase in expenditures or revenue for state government and no fiscal impact for local government as a result of enforcing or administering the section.

Ms. Coronado has also determined that for the first five years the new section is in effect, the public will benefit from having the Veterans Employment and Training Advisory Committee established to seek input of employers to better assist veterans in gaining employment and/or training. There will be no effect on individuals, or large, small, or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Ms. Coronado has also determined that for the first five-year period the proposed section is in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under the Administrative Procedure Act, §2001.022.

Comments on the proposed new section may be submitted to Tina Coronado, General Counsel, Texas Veterans Commission, 1700 North Congress Avenue, Austin, Texas 78701 or by fax to (512) 463-3288. Comments may also be submitted electronically to *tina.coronado@tvc.state.tx.us*. For comments submitted electronically, please include "Veterans Employment and Training Advisory Committee" in the subject line. The deadline for submission of comments is 20 days from the date of publication of the proposed new section in the *Texas Register*. Comments should be organized in a manner consistent with the organization of the rule under consideration.

The new section is proposed pursuant to Texas Government Code §434.010, which provides general authority for the commission to adopt rules necessary for its administration.

No other statutes, articles, or codes are affected by this section.

§458.1. Veterans Employment and Training Advisory Committee.

(a) The Veterans Employment and Training Advisory Committee is established.

(b) Purpose. The purpose of the Veterans Employment and Training Advisory Committee is to seek the input of employers to better assist veterans in gaining successful employment and/or training.

(c) The Executive Director may appoint one or more members of the commission staff to serve and assist the committee. This position(s) shall be non-voting. This person(s) shall keep minutes of committee meetings and prepare those minutes for approval by the presiding member of the committee and shall assist the presiding officer in preparing the reports required for submission to the commission.

(d) Composition and appointment of members. The Veterans Employment and Training Advisory Committee shall consist of at least 7, but no more than 15 persons appointed by the commission. Appointment to the committee will be limited to individuals who are nominated by veterans organizations that have a national employment program or individuals who are recognized authorities in the fields of business, employment, training, rehabilitation or labor.

(e) Removal of members. Members of the committee serve at the pleasure of the commission. The commission may remove a member from the committee by a majority vote of the commission.

(f) Conditions of membership. The term of office for each member appointed by the commission shall be staggered for a two-year term. To achieve staggered terms, one-half of the initial appointments will be for a two-year term; and one-half will be for a three-year term. A member whose term has expired shall continue to serve until a qualified replacement is appointed by the commission. In the event that a member appointed by the commission cannot complete his or her term

or is removed by the commission, the commission shall appoint a qualified replacement to serve the remainder of the term.

(g) No compensation. Committee members appointed by the commission shall serve without compensation. Committee members appointed by the commission are not entitled to reimbursement from the commission for travel and per diem incurred in the performance of their official duties.

(h) Meetings. The committee shall meet quarterly unless directed otherwise by the commission. The committee shall be subject to meeting at the call of the presiding member. A quorum shall consist of a majority of the committee membership.

(i) Duration. The Committee shall remain in existence as long as deemed necessary by the Commissioners of the Texas Veterans Commission.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 30, 2008.

TRD-200800519
Tina Coronado
General Counsel
Texas Veterans Commission
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 463-1981

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40 TAC §458.2

The Texas Veterans Commission (commission) proposes new Chapter 458, §458.2, concerning Fund for Veterans' Assistance Advisory Committee, which will be located in Title 40, Part 15, of the Texas Administrative Code. The proposed new section is authorized under Government Code §434.0101, granting the commission the authority to establish advisory committees for the development of rules or policies. Government Code §2110.005 requires an agency that establishes an advisory committee to adopt rules for the establishment of those committees.

Tina Coronado, General Counsel for the commission, has determined that for each year of the first five-year period that the new section is in effect there will be no increase in expenditures or revenue for state government and no fiscal impact for local government as a result of enforcing or administering the section.

Ms. Coronado has also determined that for the first five years the new section is in effect, the public will benefit from having the Fund for Veterans' Assistance Advisory Committee established to seek input as to raising and distributing funds for the Fund for Veterans' Assistance. There will be no effect on individuals, or large, small, or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Ms. Coronado has also determined that for the first five-year period the proposed section is in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under the Administrative Procedure Act, §2001.022.

Comments on the proposed new section may be submitted to Tina Coronado, General Counsel, Texas Veterans Commission, 1700 North Congress Avenue, Austin, Texas 78701 or by fax to (512) 463-3288. Comments may also be submitted electronically to *tina.coronado@tvc.state.tx.us*. For comments submitted electronically, please include "Fund for Veterans' Assistance Advisory Committee" in the subject line. The deadline for submission of comments is 20 days from the date of publication of the proposed section in the *Texas Register*. Comments should be organized in a manner consistent with the organization of the section under consideration.

The new section is proposed pursuant to Government Code §434.010, which provides general authority for the commission to adopt rules necessary for its administration.

No other statutes, articles, or codes are affected by this section.

§458.2. Fund for Veterans' Assistance Advisory Committee.

(a) The Fund for Veterans' Assistance Advisory Committee is established.

(b) Purpose. The purpose of the committee is to raise and distribute funds for the Fund for Veterans' Assistance established under §434.017 of the Texas Government Code.

(c) The Executive Director may appoint one or more members of the commission staff to serve and assist the committee. This position(s) shall be non-voting. This person(s) shall keep minutes of committee meetings and prepare those minutes for approval by the presiding member of the committee and shall assist the presiding officer in preparing the reports required for submission to the commission.

(d) Composition and appointment of members. The commission shall appoint to the committee at least 10 but no more than 18 members who at a minimum include the following:

(1) Two representatives of veterans' organizations;

(2) Three representatives of business;

(3) Two representatives of veterans;

(4) Two representatives of family members of veterans; and

(5) Other members with experience and knowledge to assist the committee achieve its purpose.

(e) Removal of members. Members of the committee serve at the pleasure of the commission. The commission may remove a member from the committee by a majority vote of the commission.

(f) Conditions of membership. The term of office for each member appointed by the commission shall be staggered for a two-year term. To achieve staggered terms, one-half of the initial appointments will be for a two-year term; and one-half will be for a three-year term. A member whose term has expired shall continue to serve until a qualified replacement is appointed by the commission. In the event that a member appointed by the commission cannot complete his or her term or is removed by the commission, the commission shall appoint a qualified replacement to serve the remainder of the term.

(g) No compensation. Committee members appointed by the commission shall serve without compensation. Committee members appointed by the commission are not entitled to reimbursement from the commission for travel and per diem incurred in the performance of their official duties.

(h) Meetings. The committee shall meet quarterly unless directed otherwise by the commission. The committee shall be subject to meeting at the call of the presiding member. A quorum shall consist of a majority of the committee membership.

(i) Duration. The Committee shall remain in existence as long as deemed necessary by the Commissioners of the Texas Veterans Commission.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 30, 2008.

TRD-200800542
Tina Coronado
General Counsel
Texas Veterans Commission
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 463-1981

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40 TAC §458.3

The Texas Veterans Commission (commission) proposes new Chapter 458, §458.3, concerning Veterans Communication Advisory Committee, which will be located in Title 40, Part 15, of the Texas Administrative Code. The proposed new section is authorized under Government Code §434.0101, granting the commission the authority to establish advisory committees for the development of rules or policies. Government Code §2110.005 requires an agency that establishes an advisory committee to adopt rules for the establishment of those committees.

Tina Coronado, General Counsel for the commission, has determined that for each year of the first five-year period that the new section is in effect there will be no increase in expenditures or revenue for state government and no fiscal impact for local government as a result of enforcing or administering the section.

Ms. Coronado has also determined that for the first five years the new section is in effect, the public will benefit from having the Veterans Communication Advisory Committee established by improving services provided by the Commission through better communication with veterans and their families. There will be no effect on individuals, or large, small, or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Ms. Coronado has also determined that for the first five-year period the proposed section is in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under the Administrative Procedure Act, §2001.022.

Comments on the proposed new section may be submitted to Tina Coronado, General Counsel, Texas Veterans Commission, 1700 North Congress Avenue, Austin, Texas 78701 or by fax to (512) 463-3288. Comments may also be submitted electronically to *tina.coronado@tvc.state.tx.us*. For comments submitted electronically, please include "Veterans Communication Advisory Committee" in the subject line. The deadline for submission of comments is 20 days from the date of publication of the proposed section in the *Texas Register*. Comments should be organized in a manner consistent with the organization of the section under consideration.

The new section is proposed pursuant to Government Code §434.010, which provides general authority for the commission to adopt rules necessary for its administration.

No other statutes, articles, or codes are affected by this section.

§458.3. Veterans Communication Advisory Committee.

(a) The Veterans Communication Advisory Committee is established.

(b) Purpose. The purpose of the committee is to improve the services provided by the Texas Veterans Commission through better communication with veterans and their families. This committee will also determine what communication methods should be used to reach OIF and OEF veterans and their families.

(c) The Executive Director may appoint one or more members of the commission staff to serve and assist the committee. This position(s) shall be non-voting. This person(s) shall keep minutes of committee meetings and prepare those minutes for approval by the presiding member of the committee and shall assist the presiding officer in preparing the reports required for submission to the commission.

(d) Composition and appointment of members. The commission shall appoint to the committee at least 10 but no more than 18 members who at a minimum include the following individuals with experience and knowledge reaching out to the various veteran populations:

(1) One representative of the communication industry;

(2) One representative of the Reserves;

(3) One representative of the Texas National Guard;

(4) One representative of the active duty military;

(5) One representative of the United States Department of Veterans Affairs;

(6) One representative of Texas Health and Human Services Commission;

(7) Other members with experience and knowledge to assist the committee achieve its purpose.

(e) Removal of members. Members of the committee serve at the pleasure of the commission. The commission may remove a member from the committee by a majority vote of the commission.

(f) Conditions of membership. The term of office for each member appointed by the commission shall be staggered for a two-year term. To achieve staggered terms, one-half of the initial appointments will be for a three-year term; and one-half will be for a two-year term. A member whose term has expired shall continue to serve until a qualified replacement is appointed by the commission. In the event that a member appointed by the commission cannot complete his or her term or is removed by the commission, the commission shall appoint a qualified replacement to serve the remainder of the term.

(g) Compensation. Committee members appointed by the commission shall serve without compensation.

(h) Meetings. The committee shall meet quarterly unless directed otherwise by the commission. The committee shall be subject to meeting at the call of the presiding member. A quorum shall consist of a majority of the committee membership.

(i) Duration. The Committee shall remain in existence as long as deemed necessary by the Commissioners of the Texas Veterans Commission.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 30, 2008.

TRD-200800543
Tina Coronado
General Counsel
Texas Veterans Commission
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 463-1981

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PART 19. DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

CHAPTER 745. LICENSING

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§745.119, 745.509, 745.601, 745.611, 745.615, 745.623, 745.625, 745.626, 745.629, 745.651, 745.663, 745.683, 745.685, 745.687, 745.693, 745.701, 745.707, and 745.735; the repeal of §745.627; and new §745.630, concerning background checks, in its Licensing chapter. The purpose of the proposed amendments, repeal, and new section is to: (1) implement new fingerprint-based criminal history checks against the Department of Public Safety (DPS) and Federal Bureau of Investigation (FBI) databases for children in child care, including new fingerprint-based criminal history checks required by amendments to §42.056, Human Resources Code, that were enacted in Senate Bill 758, 80th Legislative Session, and new fingerprint-based criminal history checks required by the federal "Adam Walsh Child Protection and Safety Act of 2006" (the Adam Walsh Act); (2) implement new out-of-state central registry checks in certain foster and adoptive homes as required by the Adam Walsh Act; (3) expand the list of criminal convictions that may be used to prevent a person from having access to children in care; (4) clarify terminology and amend certain procedures relating to the background check and risk evaluation processes; (5) add child-placing agencies to the types of child-care operations that are exempt from the payment of an amended license fee; and (6) incorporate changes as a result of House Bill (HB) 1385, Section 1, 80th Legislative Session, regarding educational exemptions. The changes will not only bring Child-Care Licensing rules in compliance with state and federal law, but will significantly enhance protections for children in child care by identifying certain persons with criminal histories or child abuse or neglect findings that are not identified under the current background check process and ensuring that such persons do not pose a risk to children in care. In addition, these changes, which will necessitate the use of fingerprint-based criminal history checks, will reduce the incidence of "false positive" matches, that sometimes result from name-based criminal history checks and cause delays in hiring qualified applicants in child-care operations.

Section 745.119 revises the current Texas Private School Accreditation Commission education exemption to only apply in a county that has a population of less than 25,000; revises an educational exemption to reduce the age of children from five to four years if the school is located in a county with a population of less than 25,000; and adds preschool to the list of grades offered at the school.

Section 745.509 adds child-placing agencies to the list of operations that are exempt from paying a fee to amend their license.

Section 745.601 amends terminology used in subsequent sections of this chapter concerning background checks in order to clarify who is subject to the new fingerprint-based criminal history check and out-of-state central registry checks.

Section 745.611 adds out-of-state central registry checks to the types of databases searched by DFPS when conducting background checks on certain persons, and significantly clarifies the names and explanation for each type of background check.

Section 745.615 is significantly amended to specify those persons for whom a fingerprint-based criminal history check is required under new mandatory provisions in §42.056(b-1) of the Human Resources Code and the federal Adam Walsh Act, or under permissive authority of §42.056(b) of the Human Resources Code. In addition, this section is amended to specify who is subject to an out-of-state central registry check.

Section 745.623 makes procedural changes to the methods that may be used by a child-care operation to submit its background check request and to require that certain new information be provided by child-placing agencies when submitting a background check for a foster or adoptive parent applicant who has lived outside the state of Texas any time during the five years preceding the person's application to become a foster or adoptive parent.

Section 745.625 clarifies language relating to when a background check request must be submitted. This clarification is necessary to implement the new background checks required under §745.615.

Section 745.626 clarifies how soon a person for whom a background check has been requested may provide direct care or have direct access to a child in care. The primary changes related to child-care centers, which are needed to comply with changes made to Human Resources Code, §42.506, regarding mandatory fingerprint-based criminal history checks for child-care centers.

Section 745.627 is repealed, and the language is incorporated in §745.623.

Section 745.629 describes the procedure used for submitting a fingerprint-based criminal history check, including a requirement to use the contractor selected by DPS for electronic submission of fingerprints when conducting a background check.

New §745.630 provides that a person does not require a new fingerprint-based criminal history check if the person has a fingerprint-based criminal history on file with DFPS and more than 24 months has not elapsed since the person underwent a background check with Licensing.

Section 745.651 adds several criminal offenses to the list of offenses for which there is a 10-year bar to persons being present in a child-care operation.

Section 745.663 clarifies the process for clearing up any claimed errors in a name-based criminal history check match.

Section 745.683 clarifies that a child-placing agency must request a risk evaluation on a non-client child of a foster or adoptive parent and requires that the risk evaluation for a licensed administrator must be requested by the CPA, general residential operation, or residential treatment center.

Section 745.685 requires that risk evaluations must be sent to the DFPS Centralized Background Check Unit, and the risk eval-

uations must be returned within 21 days if the person is continuing to work in child-care pending a risk evaluation.

Section 745.687 clarifies the documentation that must be submitted to establish that a person has completed all of the conditions of probation, including the date the probation was completed for deferred adjudications.

Section 745.693 adds certain criminal convictions to the list of those which bar a person from being present at a child-care operation and clarifies who is eligible for a risk evaluation and who can be present at a child-care operation, pending the outcome of the risk evaluation.

Section 745.701 clarifies when a person who has been arrested for an offense may be present in a child-care operation.

Section 745.707 transfers authority for approval of a risk evaluation from the Director of Child-Care Licensing to the Manager of the DFPS Centralized Background Check Unit.

Section 745.735 clarifies that, when a DFPS central registry check is conducted on a person who is a minor and that person is found to be a designated perpetrator, notice of the finding will be sent to the minor's parent rather than to the minor.

FISCAL AND ECONOMIC IMPACT STATEMENTS

Cindy Brown, Chief Financial Officer of DFPS, has determined that, for the first five-year period the proposed sections will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the sections. This is because DFPS was appropriated funds by the 80th Legislature to implement a new Centralized Background Check Unit and to automate certain processes relating to criminal history checks. In addition, while the newly required fingerprint-based criminal history checks will generate new revenues to DPS, these revenues will be offset by the cost of conducting the additional criminal history checks.

Ms. Brown also has determined that, for each year of the first five years the sections will be in effect, the public benefit anticipated as a result of enforcing the sections will be that children in regulated child care will be better protected as a result of the expanded criminal history central registry checks and related changes to the background check and risk evaluation process. These proposed changes will minimize the likelihood that a person who has engaged in prior criminal activity that may pose a risk to children, or who has previously been found to have abused or neglected a child in another state, will have access to children in child care, thus keeping children safer from persons who may pose a danger to the health and safety of those children.

Ms. Brown has determined that, for the first five years the proposed rules will be in effect, no proposed rule sections other than those discussed below are anticipated to have any fiscal impact on persons or businesses that must comply with the rules because compliance will not require any additional new equipment, staff time, or other costs.

Ms. Brown has determined that, for the first five years the proposed rules will be in effect, there will be an adverse economic impact on large, small and micro-businesses, and on other persons who must comply with the new regulations concerning fingerprint-based criminal history checks and on-line submission of background check requests, as required in §§745.615, 745.623, 745.626, 745.629, and 745.630, and supported by amendments to §§745.601, 745.611, and 745.625, and the repeal of §745.627. Collectively, these new, amended, and repealed rules will require: (1) that a large number of individuals who currently undergo a "name-based-only" criminal history check against the DPS database will now also undergo a fingerprint-based criminal history check against both the DPS and FBI databases; (2) that all child-care centers submit their background check requests to DFPS on-line; (3) that the fingerprints needed to conduct a fingerprint-based criminal history check be scanned and submitted electronically using the statewide contractor selected by DPS for this purpose; (4) that child-care centers prohibit a person subject to a fingerprint-based criminal history check from having access to children in care until the results of the check are received, subject to certain exceptions; and (5) that child-care operations familiarize themselves with the new rules and make some minor modifications to current procedures in order to implement the new rules. Each of these impacts is described below in greater detail.

The proposed rules will impact three categories of regulated child-care operations: child-care centers; child-care homes; and residential child-care operations, some of which meet the definition of a small or micro-business under Chapter 2006 of the Government Code. As defined, small and micro-businesses must be "for-profit"; therefore, all child-care operations that are "non-profit" or operated by a governmental entity were excluded from the estimates of small and micro-businesses. Although micro-businesses are also necessarily small businesses, they are separately counted, where noted, below.

Child-care centers provide care for seven or more children for less than 24 hours per day, at a location other than the permit holder's home. The average capacity for child-care centers is 94 children per center. In FY 2006, DFPS licensed 9,091 child-care centers, of which an estimated 31%, or 2,818, are estimated to be small businesses, and an additional estimated 19.6%, or 1,782, are estimated to be micro-businesses.

Child-care homes, which include licensed, registered, and listed homes, provide care for children for less than 24 hours a day in the home of the primary caregiver. The average capacity in child-care homes is 5.8 children per home. In FY 2006, DFPS licensed, registered or listed 12,987 child-care homes, 100% of which, or 12,987, are estimated to be micro-businesses.

Residential child-care operations include residential child-care facilities that provide 24-hour care for children, such as emergency shelters, residential treatment centers, and maternity homes; as well as child-placing agencies that place children in residential care settings and may verify foster and adoptive homes. In FY 2006, DFPS licensed 555 residential child-care operations, of which an estimated 8.1%, or 45, are estimated to be small businesses, and an additional estimated 1.2%, or 7, are estimated to be micro-businesses.

(1) For each of the next five years, it is estimated that the cost of the fingerprint-based criminal history check will be $44.20 per background check. This is the current fee charged to submit electronic fingerprints through the DPS contractor and includes the fees charged by DPS ($15.00) and the FBI ($19.25) for conducting the fingerprint-based criminal history check of their respective databases, as well as a $9.95 service processing fee charged by the DPS contractor. None of this cost will go to DFPS. Use of the DPS contractor is required under proposed §745.629. Although not permitted under the proposed rules, this is the same per-criminal history check charge that would be paid for conducting fingerprint-based criminal history checks through most local law enforcement entities rather than the DPS contrac-

tor, because most, though not all, local law enforcement entities also charge the $9.95 service processing fee for assisting in a fingerprint-based check.

The rules do not specify whether the $44.20 background check charge must be paid by the individual undergoing the fingerprint-based criminal history check, or by the child-care operation requesting the check; however, it is assumed that many child-care operations will absorb this cost as part of their costs of operation. The total economic impact will vary greatly, depending on the size of the operation, the number of background checks requested by the operation that are subject to the new fingerprint-based criminal history checks, the turnover rate of the operation's employees or other persons present in the child-care operation who are subject to the fingerprint-based criminal history check, and the geographic mobility of persons for whom the operation requests background checks.

As an operation type, child-care centers are likely to have the highest percentage of their background checks subject to the newly required fingerprint-based criminal history checks, since a majority of the background checks required from child-care centers will require such a check under proposed §745.615(b)(3). For the relatively small number of child-care center checks not already covered by §745.615(b)(3), some will require a fingerprint-based criminal history check under proposed §745.615(b)(1), which requires a fingerprint-based criminal history check for any person who has lived outside the state of Texas at any time during the five-year period preceding the background check or for whom a criminal history outside of Texas is suspected (hereinafter referred to as the "five-year" rule). A U. S. Census Bureau report on geographic mobility estimates that 19% of the U.S. population moves from one state to another during any given year. Thus, it is estimated that 19% of background checks requested by child-care centers that are not subject to the fingerprint-based criminal history checks under proposed §745.615(b)(3) will require a fingerprint-based criminal history check because of the five-year rule.

Child-placing agencies that absorb the costs for the fingerprint-based criminal history check will be significantly affected. Under proposed §745.615(b)(2), fingerprint-based criminal history checks will be required for all foster and adoptive parent applicants if the home will accept placement of a child in the conservatorship of DFPS. In addition, fingerprint-based criminal history checks will be required for any other adult in a foster or adoptive home where a child in DFPS conservatorship may be placed. Other child-placing agency background checks will be subject to the fingerprint-based criminal history check to the extent that they are covered by the five-year rule.

All other child-care operation types will be affected only to the extent that a background check submitted by the operation is covered by the five-year rule and only to the extent that the operation absorbs the costs of the fingerprint-based criminal history check. For larger operations, such as residential treatment centers, the estimated number of background checks subject to the five-year rule will be 19%, based on the U.S. Census Bureau geographic mobility data. Very small operations, such as listed and registered family homes, may rarely, if ever, be subject to the fingerprint-based criminal history checks under the five-year rule.

Regardless of operation type, individuals for whom a fingerprint-based criminal history check is required may have to bear the cost if the child-care operation does not pay this cost on behalf of the individual.

The cost to child-care operations and individuals for a fingerprint-based criminal history check will be mitigated in the third, fourth and fifth year that the proposed rules will be in effect. Under proposed §745.630, electronically submitted fingerprints for any given person will remain on file indefinitely, so long as Licensing continues to receive a background check request on this same person every 24 months. Thus, if a person who has a valid fingerprint-based criminal history on file with DFPS ceases to work for or be present at one child-care operation, but returns to that operation or another operation within two years from the date the person's last background check was requested, the person's fingerprints will remain on file and the person will not be required to obtain a new fingerprint scan when the person returns to the old operation or transfers to a new child-care operation. DFPS estimates that this will lead to at least a one-third reduction in ongoing costs for fingerprint-based criminal history checks that will be required of persons and child-care operations in the third, fourth and fifth years that the proposed rules will be in effect.

(2) For each of the next five years, there will be costs to some child-care centers associated with the proposed amendments in §745.623, requiring that child-care centers submit their background checks on-line through the DFPS website. Under the current rules, both child-care centers and child-care homes have the option of submitting their background checks on-line or in paper form by mail. A majority of child-care centers already submit their background checks on-line, but some do not. It is estimated that no more than 15% of child-care centers may be adversely impacted by this new requirement, because they will have to have access to a computer and Internet service in order to submit their background checks and receive the results of their background checks on-line. Although this process can be undertaken by using a publicly available computer with Internet service, such as a computer available in a local public library, and a free e-mail account available via the public Internet, this solution may not be feasible for all child-care centers. For those who do not presently have a computer and Internet service at their disposal and for whom a publicly available computer with Internet access is not a feasible option, there will be a one-time cost for purchase of a computer and monitor, at an estimated cost of $500, based on a survey of current prices advertised by electronics stores for a computer with the capability of sending and receiving e-mail. In addition, there will be an ongoing cost for Internet service of approximately $29.00 per month, which is the average cost of high-speed Internet service based on a survey of Internet service providers. In areas where dial-up service is available, the average cost for dial-up service will generally be less than the cost for high-speed Internet service.

(3) For each of the next five years, in addition to the $44.20 charge per fingerprint scan discussed under (1) above, there will be a one-time cost to persons who must undergo a fingerprint-based criminal history check that is not incurred with a name-based criminal history check. This is the cost associated with traveling to the location of the DPS contractor site to obtain the electronic fingerprint scan, as required by proposed rule §745.629. The DPS contractor currently operates in 77 different locations in the state of Texas, with two additional locations planned before the end of this year. The DPS contract requires that at least one location be available within a 50 mile radius of any location in the state. It is estimated that the travel costs associated with obtaining a fingerprint scan will range from a negligible amount (for those living in metropolitan areas near a contractor site), to a maximum of $48.50, for those living in

the most rural areas, as calculated by multiplying 100 miles (the maximum return trip distance from the contractor's site) by 48.5 cents per mile, which is the maximum state mileage reimbursement rate for travel as of September 1, 2007. It is assumed that these costs will most often be borne by the person undergoing the fingerprint-based criminal history check; however, some child-care operations may assume these costs in some instances.

(4) For each of the next five years, there may be adverse economic impact to child-care centers because proposed amendments to §745.626 prohibit a child-care center from allowing a person to provide direct care or have direct access to children in care until the person receives all the results of a fingerprint-based criminal history check from DFPS, subject to the following exception. If a center is experiencing a staffing shortage and requires the person to meet child-to-caregiver ratios, the child-care center may allow the person to work at the center as soon as the center receives notice from DFPS that the person has cleared the name-based criminal history check and the DFPS central registry check. Under current rules, the person may begin work at a child-care center prior to receipt of these same name-based check results. Typically, DFPS is able to complete the name-based portion of the background check and return "cleared" results to the child-care operation within 48 hours for background requests that are submitted on-line. This response will take longer when there is a match against the DPS criminal database or the DFPS central registry records requiring further research to determine whether the match precludes a person from having access to children in care. A child-care center that is unable to utilize a person needed to meet child-to-caregiver ratios pending the results of the name-based portion of the background check may have to hire a substitute caregiver or pay overtime to another staff member until the cleared results are received. In the event that the cost-per-hour that the center must pay the substitute caregiver is higher than the rate the center would have paid the new employee, or the center must pay overtime wages to another caregiver, the center may experience an increase in wages paid. The amount of this impact cannot be determined, but it is not anticipated that this increased cost will be so high or occur so frequently as to be a significant new cost to child-care centers when compared to overall operational costs.

(5) For the first year of the next five years, there will be a one-time cost to all child-care operations to familiarize themselves with the amended background check requirements and the location of the nearest DPS contractor site and to implement changes to internal procedures for compliance with the new rules, including the training of appropriate staff, as necessary, regarding the new requirements. This cost will vary depending on the size and type of operation; but it is estimated that most child-care operations will expend between three and ten total staff hours on these administrative activities, for a total estimated cost per child-care-operation of between $22.50 and $75.00, assuming the average wage for child-care workers who will perform these duties is $7.50 per hour.

REGULATORY FLEXIBILITY ANALYSIS

HB 3430, enacted by the 80th Legislature, amended §2006.002 of the Government Code to require a Regulatory Flexibility Analysis (RFA) for proposed rules that may have an adverse economic impact on small or micro-businesses. In developing an RFA, an agency must consider several alternative methods of achieving the purpose of the proposed rule that will reduce the adverse economic impact of the rule on small and micro-businesses, if alternative methods are consistent with the "health, safety, and environmental and economic welfare of the state". HB 3430 directed the Office of the Attorney General (OAG) to develop guidelines for the guidance of state agencies in preparing an RFA. The OAG has not yet finalized its guidelines, but has published Interim Guidelines clarifying that, when the substance of a proposed rule is required by a state or federal legislative mandate, the rule may be considered per se consistent with the health, safety, and environmental and economic welfare of the state, and the agency is not required to consider alternative methods of achieving the purpose of the rule. Likewise, the state may exercise its discretion in determining that there are no alternative methods of achieving the purpose of the proposed rule that are consistent with the health, safety, and environmental and economic welfare of the state. Following is the RFA for each of the five categories of costs described in the foregoing Fiscal and Economic Impact Statement section of this preamble.

(1) The most significant costs to small and micro-businesses associated with the proposed rules will be the $44.20 charge per fingerprint-based criminal history check required in amended §745.615, subsections (b)(1), (b)(2) and (b)(3). The fingerprint-based criminal history checks required under subsection (b)(3) for child-care centers, and under subsection (b)(2) for foster and adoptive parent applicants are required by §42.056(a-2) of the Human Resources Code (HRC) and the federal Adam Walsh Act, respectively. Thus, no alternative methods to these provisions in amended §745.615 were considered. The new fingerprint-based criminal history checks required for adults other than the foster or adoptive parent required under subsection (b)(2)(B), and the fingerprint-based criminal history checks required for all other persons who have resided outside the state of Texas in the previous five years required under subsection (b)(1), are proposed under DFPS's general authority in HRC §42.042 to adopt rules for the health, safety and welfare of children in regulated care, combined with the statutory directive under HRC §42.056(b-1) to conduct criminal history checks using either the DPS or FBI criminal history databases. A criminal history search of the FBI database must be fingerprint-based and, as a result, is more accurate than a name-based criminal history check--making it less susceptible to either a false-positive or a false-negative match, as compared with a name-based check. In addition, a check with the FBI database will detect criminal history matches that occurred outside the state of Texas that would go undetected using a name-based search of the DPS database. DFPS considered several alternatives before proposing the new fingerprint-based criminal history checks that are not required by state or federal law. Specifically, DFPS considered continuing to conduct only name-based criminal history checks for all persons not mandated to have a fingerprint-based criminal history check under state or federal law, but this option was deemed to create an unacceptable risk to children in care that was not justified by the costs associated with a fingerprint-based criminal history background check. DFPS also considered requiring that all persons undergo a fingerprint-based criminal history check, but the costs of this option outweighed the benefits, especially for persons who have never lived outside the state of Texas and who would be highly unlikely to have an out-of-state criminal history. DFPS also considered a shorter and longer period of time than the five-year period finally selected as the cut-off for requiring a fingerprint-based criminal history check under proposed §745.615(b)(1). Based on prior agency experience in conducting fingerprint-based criminal history checks for persons who have previously resided outside the state, as well as discussions of

this issue with representatives of the child-care industry, DFPS determined the five-year period to be the most appropriate period for requiring the fingerprint-based criminal history check.

(2) The new requirement in §745.623 that child-care centers submit their background check requests to DFPS on-line will also adversely affect some small and micro-businesses that do not currently have ready access to a computer and Internet service. Residential child-care operations are already required to submit their background checks on line, but child-care centers and child-care homes have the option of doing so, or of submitting their background checks by mail. DFPS considered several alternatives to this proposed rule. Specifically, DFPS considered making no change; DFPS considered requiring both child-care centers and child-care homes to submit their requests on-line; and DFPS considered requiring all child-care centers to submit their requests on-line, while continuing to allow child-care homes to submit their requests manually--which is the option that DFPS determined to be the most reasonable after considering all the costs and benefits of each option. There are numerous benefits to the on-line submittal process as compared to the manual process. The on-line submittal process has been designed to prompt the user through a series of questions to ensure that all of the information needed to complete the background check is obtained. The DFPS automated system will automatically check to determine whether a fingerprint-based criminal history check is needed, and, if so, whether the person already has a valid fingerprint-based criminal history on file or whether the person must obtain a fingerprint scan for the check. Without the benefit of this automated feature, child-care operations might require an individual to submit new fingerprints when none are needed or, conversely, might erroneously assume that no new fingerprints are needed when, in fact, the person no longer has a valid fingerprint-based criminal history on file with DFPS. The on-line process will prevent unnecessary costs for duplicate fingerprint-based criminal history checks and will prevent mistakes that could lead to a person not obtaining the required fingerprint-based criminal history check because of a mistaken assumption, which would pose undue risk to children in care. On-line submittal also ensures that, when the results of the fingerprint-based criminal history check are received, DFPS will have all necessary data to automatically forward the results of a cleared check back to the requestor electronically, without time-consuming and labor intensive efforts. This automated process should result in most cleared fingerprint-based criminal history checks being returned to the operation within 48 hours of the time the fingerprint scan is obtained by the DPS contractor.

By contrast, the manual system for submitting a background check request to DFPS does not permit a similar quality control function and often requires follow-up inquiry with the operation submitting the form to gain additional or clarifying information necessary to complete a background check. Moreover, the manual system requires submission of the request by mail, data entry by DFPS staff into the DFPS automated system, and manual return of the results by mail, adding many days to the process and requiring additional staff time. Because DFPS will typically receive the results of the fingerprint-based criminal history check from DPS within 48 hours of the fingerprints being scanned by the DPS contractor, the background check results will often be received from DPS before the manually submitted background check request is received from the child-care operation--making it difficult and time consuming to associate the criminal history results with the operation that requested the background check. At best, the entire process of conducting a check based on a manual submission process, assuming no errors in completion of the forms, no delays in mailing, and no delays in associating the fingerprint results with the operation that requested the background check, will take roughly one business week longer than the on-line submission process. Experience indicates, however, that additional delays are common.

Given the high volume of child-care center requests that will be subject to the new fingerprint-based criminal history checks, the fact that most child-care centers already submit their requests on-line, the additional staff time needed to process fingerprint-based criminal history checks using a manual process, the potential that operations may err in determining when to obtain the fingerprint-based criminal history check, and the fact that errors and delays in the process pose inherent risks to children, DFPS has determined that the benefits outweigh the cost of the proposed rule. On the other hand, given the fact that a much smaller percentage of child-care homes currently submit their background checks on-line and the fact that many will rarely, if ever, require a fingerprint-based criminal history check under the five-year rule, DFPS determined that the cost of imposing this new requirement on child-care homes outweighs the benefits.

(3) State law permits, but does not require, DFPS to conduct fingerprint-based criminal history checks by using the DPS-selected contractor. DFPS has opted to require that fingerprints be submitted through the DPS contractor under proposed §745.629. The only other option for obtaining fingerprint-based criminal history checks would have been to permit persons to obtain a fingerprint card from a local law enforcement entity that prepares a fingerprint card using the ink impression method. Had DFPS not imposed the use of the DPS contractor, there might have been reduced travel costs to some small and micro-businesses associated with the decreased distance to the nearest local law enforcement entity to obtain the fingerprint card. DPS will only accept electronic fingerprint cards when submitted by its contractor, and this method has many added-value features as compared with ink-based fingerprint checks. The DPS contractor prepares the fingerprint card by electronically scanning the fingerprints and immediately forwarding the scanned prints electronically to DPS for automated matching against DPS and FBI criminal history databases. This automated method allows most results to be returned to DFPS and automatically forwarded back to the child-care operation within 48 hours.

Even more importantly, DPS has established a system for storing all electronically scanned fingerprints submitted through its contractor for an appropriate retention period, as determined by the governmental entity submitting the background request. For any such stored fingerprints, DPS will automatically notify the governmental entity any time there is a new match between the fingerprints and the DPS and FBI criminal history databases. In short, by using the DPS contractor, Licensing will now be able to obtain a continuously updated criminal history record on all persons for whom a background check has been requested within the previous 24 months and will no longer have to await the every-two-year background check renewal to resubmit a person's name against the DPS records to discover a new arrest or conviction that took place in the intervening 24 months since the prior background check was undertaken. This new system will greatly enhance protections for children since it will ensure that a person who "clears" an initial criminal history check but who is subsequently arrested or convicted of a crime that would prevent that person from having access to children in child care will no longer be able to avoid detection during the two-year pe-

riod between background checks. Moreover, the fact that DPS will store the scanned prints obtained through its contractor until notified to destroy the prints is the reason that persons and child-care operations will not have to obtain new prints every two years, which would have greatly increased the overall costs of the new fingerprint-based criminal history checks to child-care operations and individuals. Accordingly, DFPS has determined that no other alternative method of implementing the new fingerprint-based criminal history check requirements is available that will accomplish the same purposes as proposed §745.629.

(4) Proposed amendments to §745.626, prohibiting child-care centers from allowing persons to have access to children in care until the results of all or part of the required background checks have been completed may have an adverse impact on small and micro-businesses as described in the foregoing Fiscal and Economic Impact Statement. This requirement is mandated by new HRC §42.056(g) and, therefore, no alternatives can be considered that are consistent with the health, safety, and economic welfare of the state.

(5) Finally, there may be slight adverse economic impact to small and micro-businesses as a result of the administrative overhead associated with implementing the proposed rules, including the costs of familiarizing appropriate staff with the new requirements, training, and making needed changes to any internal procedures related to the background check process. Such costs are a necessary and unavoidable cost of implementing the new rules; and thus no alternatives can be considered that would be consistent with the health, safety and economic welfare of the state.

HHSC has determined that the proposed amendments, new section, and repeal do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under §2007.043, Government Code.

Questions about the content of the proposal may be directed to Tiffany Ashby at (512) 438-2638 in DFPS's Licensing Division. Electronic comments may be submitted to Marianne.Mcdonald@dfps.state.tx.us. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-373, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

SUBCHAPTER C. OPERATIONS THAT ARE EXEMPT FROM REGULATION

DIVISION 2. EXEMPTIONS FROM REGULATION

40 TAC §745.119

The amendment is proposed under Human Resources Code (HRC), §40.0505, and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The proposed amendment implements House Bill 1385 Section 1, 80th Legislative Session.

§745.119. What educational facilities are exempt from Licensing regulation?

The following educational facilities and programs are exempt from our regulation:

Figure: 40 TAC §745.119

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800597
Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 438-3437

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SUBCHAPTER E. FEES

40 TAC §745.509

The amendment is proposed under Human Resources Code (HRC), §40.0505, and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The proposed amendment implements HRC, §42.056, as enacted by Senate Bill 758, 80th Session.

§745.509. What fees must I pay to apply for and maintain a license for an operation?

The following chart contains fees required for licenses, (including child day-care and residential child-care operations, child-placing agencies, and maternity homes), when the fees are due, and the consequences for failure to pay the fees on time:

Figure: 40 TAC §745.509

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800598
Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 438-3437

♦ ♦ ♦

SUBCHAPTER F. BACKGROUND CHECKS

DIVISION 1. DEFINITIONS

40 TAC §745.601

The amendment is proposed under Human Resources Code (HRC), §40.0505, and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The proposed amendment implements HRC, §42.042, and 42 USC §671.

§745.601. What words must I know to understand this subchapter?
These words have the following meanings:

(1) Continuous stay--Staying overnight or consecutive nights at an operation [~~Frequently--More than two times in a 30-day period~~].

(2) Direct care or direct access--Being counted in the child-to-caregiver ratio or having any responsibility that requires contact with children in care.

(3) Frequently present at your operation--More than two non-continuous visits at your operation in a 30-day period; one continuous stay per year at your operation and the duration of the stay exceeds seven days; or more than two continuous stays per year at your operation and the duration of each stay exceeds 48 hours.

(4) Non-continuous visit--Being physically present at an operation for a period of time of less than 24 hours. Multiple or periodic visits to an operation within the same day is one visit.

(5) [~~(2)~~] Regularly--On a scheduled basis.

(6) Unsupervised access--The person is allowed to be with children without the presence of a qualified caregiver.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800599
Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 438-3437

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DIVISION 2. REQUESTING BACKGROUND CHECKS

40 TAC §§745.611, 745.615, 745.623, 745.625, 745.626, 745.629, 745.630

The amendments and new section are proposed under Human Resources Code (HRC), §40.0505, and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC, §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The proposed amendments and proposed new section implement HRC §42.042, 42 USC §671, and HRC §42.056, as enacted by Senate Bill 758, 80th Session.

§745.611. What are background checks?
[~~Background checks are searches of different databases.~~] There are four [~~three~~] types of background checks:

(1) A name-based criminal history check: the Department of Public Safety (DPS) conducts a comparative search between a person's name and the DPS database of crimes committed in the State of Texas [~~Criminal history checks conducted by the Department of Public Safety for crimes committed in the state of Texas~~];

(2) A fingerprint-based criminal history check: DPS and the Federal Bureau of Investigation (FBI) conduct comparative searches between a person's fingerprints and the DPS database of crimes committed in the State of Texas and the FBI database of crimes committed anywhere in the United States, respectively; [~~Criminal history checks conducted by the Federal Bureau of Investigation for crimes committed anywhere in the United States; and~~]

(3) A DFPS central [~~Central~~] registry check: DFPS conducts a comparative search between a person's name and the DFPS central registry, which [~~checks conducted by PRS. The Central Registry~~] is a DFPS database of people who have been found by DFPS's divisions of Child Protective Services, Adult Protective Services, or Licensing to have abused or neglected a child; and

(4) An out-of-state central registry check: a comparative search between a person's name and another state's database of persons who have been found to have abused or neglected a child.

§745.615. On whom must I request background checks?
(a) You must request a name-based criminal history check and a DFPS central registry check for [~~background checks for each person 14 years or older, other than clients of the operation, who will regularly or frequently be present at your operation while children are in care, including~~]:

(1) The directors, owners, operators, or administrators of the operation;

(2) [~~(1)~~] Employees and applicants you intend to hire [~~that will provide direct care or have direct access to a child in care~~];

(3) [~~(2)~~] Any person(s), including volunteers, who are counted in any [~~the~~] child/caregiver ratio required in minimum standards;

(4) [~~(3)~~] Person(s) applying to adopt or foster children through any licensed or certified child-placing agency; [~~and~~]

(5) [~~(4)~~] Any person [~~under contract with your operation~~] who has unsupervised access [~~contact~~] with children in care; [~~on a regular or frequent basis.~~]

(6) Non-client residents of the operation that are 14 years or older;

(7) Applicants for a child-care administrator's license; and

(8) Any other person 14 years or older, excluding client residents, who will regularly or frequently be present at your operation while children are in care.

(b) In addition:

(1) You must request a fingerprint-based criminal history check for any person who requires a background check under subsection (a) of this section if that person has lived outside of Texas any time during the previous five years or there is reason to believe other criminal history exists;

(2) Child-placing agencies and independent foster homes that will accept the placement of children in the conservatorship of DFPS must request a fingerprint-based criminal history check for:

(A) Any foster and/or adoptive parent applicant, including a person who has adopted in the past and who applies to adopt again unless the person is also verified as a foster/adopt home; and

(B) Any adults 18 years or older in a foster or adoptive home; and

(3) Child-care centers must request a fingerprint-based criminal history check for:

(A) The directors, owners, operators, or administrators of the center;

(B) Employees and applicants you intend to hire;

(C) Any person(s), including volunteers, who are counted in the child/caregiver ratio specified in §746.1601 of this title (relating to How many children may one caregiver supervise?), §746.1701 of this title (relating to How many children may one caregiver supervise if 12 or fewer children are in care?), and §746.1901 of this title (relating to If I operate a get-well care program, must I use a different child/caregiver ratio?); and

(D) Any person who has unsupervised access to children in care.

[(b) You must also request background checks for the following:]

[(1) The directors, owners, operators, or administrators of the operation;]

[(2) Non-client residents of the operation that are 14 years or older; and]

[(3) Applicants for a child-care administrator's license.]

(c) In addition, child-placing agencies and independent foster homes that will accept the placement of children in the conservatorship of DFPS must request an out-of-state central registry check for a foster or adoptive parent applicant who has lived outside of the state any time during the previous five years preceding the person's application to become a foster or adoptive parent.

(d) [(c)] You do not have to request a background check on professionals who have currently cleared a background check in compliance with [through] another governmental entity's requirements, if [regulatory entity, and] you do not employ or contract with the professional.

§745.623. How do I request a background check?

(a) (No change.)

(b) If you operate a child day-care operation other than a child-care center, you must [can] complete a request for a background check either:

(1) On-line [on-line] through the DFPS website; or

(2) Send [or send] in a request via a signed form provided by your local Licensing office or the DFPS Centralized Background Check Unit.

(c) If you operate a residential child-care operation or a child-care center, you must submit your requests on-line through the DFPS website.

(d) If you operate a child-placing agency or independent foster home, you must also include any addresses, including counties, where a foster or adoptive parent applicant has lived outside of the state of Texas any time during the five years preceding the person's application to become a foster or adoptive parent.

§745.625. When must I submit a request for a background check?

(a) You must submit a request for a background check:

(1) At the time [When] you submit your application for a permit to us;

(2) At the time you hire someone;

(3) At the time you contract with someone who requires a background check;

(4) At the time a person applies to be a foster or adoptive parent;

(5) [(2)] At the time [When] a non-client resident 14 years [old] or older [lives or] moves into your home or operation, or a non-client resident living in your home or operation becomes 14 years old;

(6) At the time you become aware of anyone requiring a background check under §745.615 of this title (relating to On whom must I request background checks?); and

[(3) When you apply to be a foster or adoptive parent; and]

(7) [(4)] Every 24 months after each person's background check [name] was first submitted.

[(b) In addition, if you operate a residential child-care operation:]

[(1) You must submit a background check request before you hire a new person who will provide direct care or have direct access to a child in care; and]

[(2) For an employee who will not provide direct care or have direct access to a child in care, you must submit a background check request within two business days after the new person is hired or is present in your operation.]

(b) [(c)] Not withstanding subsection (a) of this section [In addition], if you operate a child day-care operation other than a child-care center, you must submit a background check request within two business days after a new person is hired or is present in your operation and every 24 months after the person's background check was first submitted.

§745.626. How soon after I request a background check on a person can that person provide direct care or have direct access to a child [in a residential child-care operation]?

(a) For residential child-care operations:

(1) You must have all required background check results from DFPS before you can allow a person to provide direct care or have direct access to a child. However, if [If] you do not receive the results of the background check within two working days of submission, you may allow a person to provide direct care or have direct access to a child until you receive the results of the background check performed by DFPS, when the following conditions apply:

(A) You have obtained [you may obtain] a criminal history check on the person through the Department of Public Safety (DPS) at http://records.txdps.state.tx.us/. The results of the criminal

history check obtained from DPS must be kept in a sealed envelope in the person's personnel record or in another location, accessible to us; and

(B) Your [~~If your~~] DPS check verifies that the person has no criminal history [~~, you may allow the person to have unsupervised client contact until you receive the results of the background check performed by the DFPS. The results of the criminal history check obtained from DPS must be kept in a sealed envelope in the person's personnel record or in another location, accessible to us. In accordance with Texas Government Code, §411.085, these results should not be released or disseminated for any other purpose~~].

[~~(b) Otherwise, you may not allow the person to provide direct care or have direct access to a child in care until you receive the results of the person's background check.~~]

(2) [~~(c)~~] For verifying foster homes, foster group homes, and adoptive homes, please see §745.633 of this title (relating to Can a child-placing agency (CPA) verify a foster home, foster group home, or adoptive home prior to receiving the results of the background checks?).

(b) For all child day-care operations other than child-care centers, you may allow the person to have direct care or direct access after you request a background check unless or until DFPS notifies you that the person may not be present at your operation while children are in care.

(c) For child-care centers:

(1) You must have all required background check results from DFPS before you can allow a person to provide direct care or have direct access to a child in care unless the following conditions apply:

(A) You provide us with documentation that proves your center is experiencing a shortage of staff and would otherwise not be able to meet DFPS child-to-caregiver ratios stated in Chapter 746 of this title (relating to Minimum Standards For Child-Care Centers) or the child-to-caregiver ratio documented in your written operational policies and procedures, whichever is more stringent; and

(B) You have received from us the results of the name-based criminal history check and the DFPS central registry check, and DFPS has not notified you that the person may not be present at your operation while children are in care.

(2) If the fingerprint criminal history check results reveal information that would preclude the person from being present at your operation, then you must immediately terminate the person's employment.

§745.629. How do I submit fingerprints [~~an FBI fingerprint card~~] for a fingerprint-based criminal history [~~background~~] check?

After you make your request through DFPS, you must submit the fingerprints electronically through the assigned applicant fingerprinting service center of DPS. [~~We will provide you with a fingerprint card. The person who will be the subject of the FBI check must then go to his local law enforcement office or DPS office and have his fingerprints taken. Then you send the completed card to your local Licensing office.~~]

§745.630. If a fingerprint-based criminal history check has already been completed on a person, is a new fingerprint-based criminal history check required for that person every 24 months?

A person does not require a new fingerprint-based criminal history check if:

(1) The person has a fingerprint-based criminal history on record with DFPS; and

(2) It has not been more than twenty-four (24) months since a name-based criminal history check was resubmitted.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800600
Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 438-3437

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40 TAC §745.627

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Department of Family and Protective Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under Human Resources Code (HRC), §40.0505, and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The proposed repeal implements HRC §42.042.

§745.627. When should I request an FBI criminal history check?

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800601
Gerry Williams
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Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 438-3437

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DIVISION 3. CRIMINAL CONVICTIONS AND CENTRAL REGISTRY FINDINGS OF CHILD ABUSE OR NEGLECT

40 TAC §745.651, §745.663

The amendments are proposed under Human Resources Code (HRC), §40.0505, and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The proposed amendments implement HRC §42.042.

§745.651. What types of criminal convictions may preclude a person from being present in an operation?

(a) (No change.)

(b) A misdemeanor or felony committed within the past 10 years under [~~the~~]:

(1) The Texas Controlled Substances Act; [~~,~~]

(2) The following sections or chapters of the TPC:

(A) §39.04 (Violations of the Civil Rights of Person in Custody; Improper Sexual Activity with Person in Custody);

(B) §42.08 (Abuse of Corpse);

(C) §42.09 (Cruelty to Animals);

(D) §42.091 (Attack on Assistance Animal);

(E) §42.092 (Cruelty to Nonlivestock Animals);

(F) §42.10 (Dog Fighting);

(G) §46.13 (Making a Firearm Accessible to a Child); or

(H) Chapter 49 (Intoxication and Alcoholic Beverage Offenses) [~~of Title 10 of the Texas Penal Code~~]; or [~~,~~]

(3) The Texas Alcoholic Beverage Code, §106.06 (Purchase of Alcohol for a Minor; Furnishing Alcohol to a Minor); [~~or~~]

(4) Any[~~any~~] like offense of [~~under~~] the law of another state or federal law [~~that the person committed within the past ten years~~]; or

(c) Any other felony committed within the past 10 years under the TPC [~~Texas Penal Code~~] or any like offense of [~~under~~] the law of another state or federal law [~~that the person committed within the past ten years; and~~]; or

(d) (No change.)

§745.663. What if the person with the criminal conviction or central registry finding believes the information obtained is incorrect?

Your responsibilities are the same as noted in §745.661 of this title (relating to What must I do after Licensing notifies me that a person at my operation has one of these types of criminal convictions or central registry findings?). However, you may contact the local Licensing staff who sent the notice letter to discuss the accuracy of the information. For criminal convictions, you may conduct a fingerprint-based criminal history check through DPS [~~an FBI fingerprint check~~] to determine the accuracy of the conviction.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800602
Gerry Williams
General Counsel
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Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 438-3437

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DIVISION 4. EVALUATION OF RISK BECAUSE OF A CRIMINAL CONVICTION OR A CENTRAL REGISTRY FINDING OF CHILD ABUSE OR NEGLECT

40 TAC §§745.683, 745.685, 745.687, 745.693, 745.701, 745.707

The amendments are proposed under Human Resources Code (HRC), §40.0505, and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The proposed amendments implement HRC §42.042 and 42 USC §671.

§745.683. Who is responsible for submitting a request for a risk evaluation?

(a) (No change.)

(b) If the person with the criminal conviction or central registry finding is a child-placing agency foster parent, [~~or~~] adoptive parent, or the non-client child of the foster or adoptive home, then the child-placing agency must request the risk evaluation; [~~and~~]

(c) If the person with the criminal conviction or central registry finding is a child-care administrator, then the child-placing agency, general residential operation, or residential treatment center must request the risk evaluation; and

(d) [~~(c)~~] For everyone else, the governing body, director, designee, independent foster home parent, or family home caregiver, as appropriate, must request the risk evaluation.

§745.685. How do I submit a request for a risk evaluation?

You must [~~obtain a risk evaluation form from your local Licensing office,~~] complete the risk evaluation form, attach the appropriate documentation, and send the form back to the DFPS Centralized Background Check Unit [~~your local Licensing office~~]. If you have been notified that a person requiring a background check may continue to work or be present in child-care pending a risk evaluation, the form must be completed and returned within 21 calendar days.

§745.687. What must I include in my request for a risk evaluation based on criminal history?

You must include the following:

(1) - (4) (No change.)

(5) If the person was given a probated sentence, information related to the terms and conditions of the probation, including documentation that the person paid all court costs and supervision fees and court-ordered restitution and fines;

(6) If the individual received deferred adjudication, include the date that the probation was or will be completed;

(7) [~~(6)~~] The nature and seriousness of the crime for which he was convicted;

(8) [~~(7)~~] The extent and nature of the person's past criminal history;

(9) [~~(8)~~] Age of the person when the crime was committed;

(10) [~~(9)~~] The time that has elapsed since the person's last criminal activity;

(11) [~~(10)~~] Evidence of rehabilitative effort;

(12) [~~(11)~~] The conduct and work activities of the person;

(13) [~~(12)~~] Other evidence of the person's present fitness, including letters of recommendation from the prosecuting attorney, law enforcement, and correctional officers who were involved in the case;

(14) [~~(13)~~] Documentation showing that the person has maintained a record of steady employment, has supported his children, has maintained a record of good conduct, and has paid any outstanding court costs, fees, fines, and restitution related to the conviction or deferred adjudication; and

(15) [~~(14)~~] If the person is an employee or volunteer or potential employee or volunteer, information about his anticipated job responsibilities, plans for supervision, and hours and days of service.

§745.693. In what circumstances can someone with a criminal history be present in a child-care operation?

[~~(a)~~] The following chart lists the types of criminal convictions that we monitor, whether the person with the conviction is eligible for a risk evaluation, and whether he may be present in a child-care operation while children are in care pending the outcome of the risk evaluation:

Figure: 40 TAC §745.693

[~~(b) We will treat a deferred adjudication the same as a conviction until the probation is successfully completed.~~]

§745.701. May a person arrested or charged with a crime be present in an operation while children are in care?

We determine on a case-by-case basis whether someone arrested or charged with a crime may be present in an operation while children are in care. The person may not be present if a conviction for the arrest or charged offense would prohibit him from being at the operation pending the outcome of a risk evaluation, or if we determine that he poses an immediate threat to the health or safety of children.

§745.707. Who makes the final decision on a risk evaluation?

The manager of the DFPS Centralized Background Check Unit [~~Director of Licensing~~] or his designee reviews the risk evaluation request and determines whether or not a person with a criminal conviction or central registry finding poses a risk to children in a particular operation. [~~If a child day-care operation requests the evaluation, the designee will be a district director. If a residential operation requests the evaluation, the designee will be a division administrator.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800603
Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 438-3437

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DIVISION 5. DESIGNATED AND SUSTAINED PERPETRATORS OF CHILD ABUSE OR NEGLECT

40 TAC §745.735

The amendment is proposed under Human Resources Code (HRC), §40.0505, and Government Code, §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The proposed amendment implements HRC §42.042.

§745.735. What notice will Licensing send a designated perpetrator or a sustained perpetrator working at an operation?

(a) - (b) (No change.)

(c) If a designated perpetrator is a minor, we will address the designation to the parents of the minor.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800604
Gerry Williams
General Counsel
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Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 438-3437

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CHAPTER 749. CHILD-PLACING AGENCIES

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§749.43, 749.2001, 749.2903, and 749.2905, concerning what do certain words and terms mean in this chapter, what do certain words mean in this subchapter, who must conduct fire and health inspections at a foster home, and how often must fire and health inspections be conducted at a foster home, in its Child-Placing Agencies chapter. The purpose of the amendments is to facilitate more inspections in

foster family homes, thereby helping to ensure that fire inspections do not present a barrier to verifying or maintaining foster family homes. Section 749.43 adds a definition for certified fire inspectors. In §749.2001, some paragraphs are renumbered as a result of the change in §749.43. Section 749.2903 outlines expectations for fire and health inspections in foster homes. The amendment separates the expectations for foster family homes versus foster group homes, in order to clarify differing expectations depending on the type of foster home. Section 749.2905 adds a reference to a certified fire inspector to be consistent with changes to §749.2903.

Cindy Brown, Chief Financial Officer of DFPS, has determined that for the first five-year period the proposed sections will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Brown also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be that the child-placing agencies will be able to verify and retain more foster homes for children in need of substitute care. There will be no effect on large, small, or micro-businesses because the proposed change does not impose new requirements on any business and does not require the purchase of any new equipment or any increased staff time in order to comply. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

HHSC has determined that the proposed amendments do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under §2007.043, Government Code.

Questions about the content of the proposal may be directed to Amy Chandler at (512) 438-3134 in DFPS's Licensing Division. Electronic comments may be submitted to Marianne.Mcdonald@dfps.state.tx.us. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-374, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

SUBCHAPTER B. DEFINITIONS AND SERVICES

DIVISION 1. DEFINITIONS

40 TAC §749.43

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

§749.43. What do certain words and terms mean in this chapter?

The words and terms used in this chapter have the meanings assigned to them under §745.21 of this title (relating to What do the following words and terms mean when used in this chapter?), unless another meaning is assigned in this section or unless the context clearly indicates otherwise. The following words and terms have the following meanings unless the context clearly indicates otherwise:

(1) - (6) (No change.)

(7) Certified fire inspector--Person certified by the Texas Commission on Fire Protection to conduct fire inspections.

(8) [~~(7)~~] Child/caregiver ratio--The maximum number of children for whom one caregiver can be responsible.

(9) [~~(8)~~] Child in care--A child or a young adult who has been placed by a child-placing agency in a foster or adoptive home, regardless of whether the child is temporarily away from the home, as in the case of a child at school or at work or receiving respite child-care services. Unless a child has been discharged from the child-placing agency, he is considered a child in care.

(10) [~~(9)~~] Child passenger safety seat system--An infant or child passenger restraint system that meets the federal standards for crash-tested restraint systems as set by the National Highway Traffic Safety Administration.

(11) [~~(10)~~] Counseling--A procedure used by professionals from various disciplines in guiding individuals, families, groups, and communities by such activities as delineating alternatives, helping to articulate goals, processing feelings and options, and providing needed information. This definition does not include career counseling.

(12) [~~(11)~~] Days--Calendar days, unless otherwise stated.

(13) [~~(12)~~] De-escalation--Strategies used to defuse a volatile situation, to assist a child to regain behavioral control, and to avoid a physical restraint or other behavioral intervention.

(14) [~~(13)~~] Department--The Department of Family and Protective Services (DFPS).

(15) [~~(14)~~] Discipline--A form of guidance that is constructive or educational in nature and appropriate to the child's age, development, situation, and severity of the behavior.

(16) [~~(15)~~] Disinfecting solution--A disinfecting solution may be:

(A) A self-made solution, prepared as follows:

(i) One tablespoon of regular strength liquid household chlorine bleach to each gallon of water used for disinfecting such items as toys, eating utensils, and nonporous surfaces (such as tile, metal, and hard plastics); or

(ii) One-fourth cup of regular strength liquid household chlorine bleach to each gallon of water used for disinfecting surfaces such as bathrooms, crib rails, diaper-changing tables, and porous surfaces, such as wood, rubber or soft plastics; or

(B) A commercial product that meets the Environmental Protection Agency's (EPA's) standards for "hospital grade" germicides (solutions that kill germs) that you must use according to label directions.

(17) [~~(16)~~] Emergency Behavior Intervention--Interventions used in an emergency situation, including personal restraints, mechanical restraints, emergency medication, and seclusion.

(18) [~~(17)~~] Family applicants--All residents, part- or full-time, of a household that are being considered for verification as an agency foster home or approved as an adoptive home.

(19) [~~(18)~~] Family members--An individual related to another individual within the third degree of consanguinity or affinity. For

the definitions of consanguinity and affinity, see Chapter 745 of this title (relating to Licensing). The degree of the relationship is computed as described in Government Code, §573.023 (relating to Computation of Degree of Consanguinity) and §573.025 (relating to Computation of Degree of Affinity).

(20) [~~(19)~~] Food service--The preparation or serving of meals or snacks.

(21) [~~(20)~~] Foster family home--A home that is the primary residence of the foster parent(s) and provides care for six or fewer children or young adults, under the regulation of a child-placing agency.

(22) [~~(21)~~] Foster group home--An operation verified:

(A) After January 1, 2007, that is the primary residence of the foster parent(s) and provides care for seven to 12 children or young adults, under the regulation of a child-placing agency; or

(B) Prior to January 1, 2007, that provides care for seven to 12 children or young adults, under the regulation of a child-placing agency.

(23) [~~(22)~~] Foster home--As referred to in this chapter means both types of homes, foster family homes and foster group homes.

(24) [~~(23)~~] Foster home screening--A written evaluation, prior to the placement of a child in a foster home, of the:

(A) Prospective foster parent(s);

(B) Family of the prospective foster parent(s); and

(C) Environment of the foster parent(s) and their family in relation to their ability to meet the child's needs.

(25) [~~(24)~~] Foster parent--A person who provides foster care services in the foster home.

(26) [~~(25)~~] Full-time--At least 30 hours per week.

(27) [~~(26)~~] Garbage--Food or items that when deteriorating cause offensive odors and/or attract rodents, insects, and other pests.

(28) [~~(27)~~] Health-care professional--A licensed physician, licensed registered nurse with appropriate advanced practice authorization from the Texas Board of Nurse Examiners, a licensed vocational nurse (LVN), a licensed registered nurse (RN), or other licensed medical personnel providing health care to the child within the scope of his license. This does not include medical doctors or medical personnel not licensed to practice in the United States.

(29) [~~(28)~~] Human services field--A field of study that contains coursework in the social sciences of psychology and social work including some counseling classes focusing on normal and abnormal human development and interpersonal relationship skills from an accredited college or university. Coursework in guidance counseling does not apply.

(30) [~~(29)~~] Immediate danger--A situation where a prudent person would conclude that bodily harm would occur if there were no immediate interventions. Immediate danger includes a serious risk of suicide, serious physical injury, or the probability of bodily harm resulting from a child running away if under 10 years old chronologically or developmentally. Immediate danger does not include:

(A) Harm that might occur over time or at a later time; or

(B) Verbal threats or verbal attacks.

(31) [~~(30)~~] Infant--A child from birth through 17 months.

(32) [~~(31)~~] Livestock--An animal raised for human consumption or an equine animal.

(33) [~~(32)~~] Living quarters--A structure or part of a structure where a group of children reside, such as a building, house, cottage, or unit.

(34) [~~(33)~~] Long-term placement--A placement intended to last for more than 90 days.

(35) [~~(34)~~] Master record--The compilation of all required records for a specific person or home, such as a master personnel record, master case record for a child, or a master case record for a foster or adoptive home.

(36) [~~(35)~~] Non-ambulatory--A child that is only able to move from place to place with assistance, such as a walker, crutches, a wheelchair, or prosthetic leg.

(37) [~~(36)~~] Non-mobile--A child that is not able to move from place to place, even with assistance.

(38) [~~(37)~~] Person legally authorized to give consent--The person legally authorized to give consent by the Texas Family Code or a person authorized by the court.

(39) [~~(38)~~] Physical force--Pressure applied to a child's body that reduces or eliminates the child's ability to move freely.

(40) [~~(39)~~] Post-adoptive services--Services available through the child-placing agency (direct or on referral) to birth and adoptive parents and the adoptive child after the adoption is consummated. Examples include counseling, maintaining a registry if a central registry is not used, providing pertinent, new medical information to birth or adoptive parents, or providing the adult adoptee a copy of his record upon request.

(41) [~~(40)~~] Post-placement report--A written evaluation of the assessments and interviews, after the adoptive placement of the child, regarding the:

(A) Child;

(B) Prospective adoptive parent(s);

(C) Family of the prospective adoptive parent(s);

(D) Environment of the prospective adoptive parent(s) and their family; and

(E) Adjustment of all individuals to the placement.

(42) [~~(41)~~] Pre-adoptive home screening--A written evaluation, prior to the placement of a child in an adoptive home, of the:

(A) Prospective adoptive parent(s);

(B) Family of the prospective adoptive parents; and

(C) Environment of the adoptive parents and their family in relation to their ability to meet the needs of a child, and if a child has been identified for adoption, the needs of that particular child.

(43) [~~(42)~~] PRN--A standard order or prescription that applies "pro re nata" or "as needed according to circumstances."

(44) [~~(43)~~] Professional service provider--Refers to:

(A) A child placement management staff or person qualified to assist in child placing activity;

(B) A psychiatrist licensed by the Texas State Board of Medical Examiners;

(C) A psychologist licensed by the Texas State Board of Examiners of Psychologists;

(D) A master's level social worker or higher licensed by the Texas State Board of Social Work Examiners;

(E) A professional counselor licensed by the Texas State Board of Examiners of Professional Counselors;

(F) A marriage and family therapist licensed by the Texas State Board of Examiners of Marriage and Family Therapists; and

(G) Other professional employees in fields such as drug counseling, nursing, special education, vocational counseling, pastoral counseling, and education who may be included in the professional staffing plan for your agency that provides treatment services if the professional's responsibilities are appropriate to the scope of the agency's program description. These professionals must have the minimum qualifications generally recognized in the professional's area of specialization.

(45) [~~(44)~~] Re-evaluation--Includes an assessment of all factors required for the initial evaluation only for the purpose of determining if any substantive changes have occurred. If substantive changes have occurred, these areas must be fully evaluated.

(46) [~~(45)~~] Regularly--On a recurring, scheduled basis.

(47) [~~(46)~~] Sanitize--A four-step process that must be followed in the subsequent order:

(A) Washing with water and soap;

(B) Rinsing with clear water;

(C) Soaking in or spraying on a disinfecting solution for at least 10 minutes. Rinsing with cool water only those items that a child is likely to place in his mouth; and

(D) Allowing the surface or article to air-dry.

(48) [~~(47)~~] School-age child--A child who is five years old or older and who will attend school in August or September of that year.

(49) [~~(48)~~] Seat belt--A lap belt and any shoulder strap included as original equipment on or added to a motor vehicle.

(50) [~~(49)~~] Service plan--A plan that identifies a child's basic and specific needs and how those needs will be met.

(51) [~~(50)~~] State or local fire inspector--A fire official designated by the city, county, or state government.

(52) [~~(51)~~] State or local sanitation official--A sanitation official designated by the city, county, or state government that is trained in sanitary science to perform duties relating to education and inspections in environmental sanitation.

(53) [~~(52)~~] Substantial bodily harm--Physical injury serious enough that a prudent person would conclude that the injury required professional medical attention. It does not include minor bruising, the risk of minor bruising, or similar forms of minor bodily harm that will resolve healthily without professional medical attention.

(54) [~~(53)~~] Toddler--A child from 18 months through 35 months old.

(55) [~~(54)~~] Treatment director--The person responsible for the overall treatment program providing treatment services. A treatment director may have other responsibilities and may designate treatment director responsibilities to other qualified persons.

(56) [~~(55)~~] Universal precautions--An approach to infection control where all human blood and certain human body fluids are treated as if known to be infectious for HIV, HBV, and other bloodborne pathogens.

(57) [~~(56)~~] Volunteer--A person who provides services:

(A) Child-care services, treatment services, or programmatic services under the auspices of the agency without monetary compensation, including a "sponsoring family;" or

(B) Any type of services under the auspices of the agency without monetary compensation when the person has unsupervised access to a child in care.

(58) [~~(57)~~] Water activities--Activities related to the use of splashing pools, wading pools, swimming pools, or other bodies of water.

(59) [~~(58)~~] Young adult--An adult whose chronological age is between 18 and 22 years, who is currently in a residential child-care agency, and who continues to need child-care services.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800605
Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 438-3437

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SUBCHAPTER L. FOSTER CARE SERVICES: EMERGENCY BEHAVIOR INTERVENTION
DIVISION 1. DEFINITIONS

40 TAC §749.2001

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

§749.2001. What do certain words mean in this subchapter?

These words have the following meaning in this subchapter:

(1) (No change.)

(2) De-escalation--See §749.43(13) [~~§749.43(12)~~] of this title (relating to What do certain words and terms mean in this chapter?).

(3) Emergency behavior intervention--See §749.43(17) [~~§749.43(16)~~] of this title.

(4) - (7) (No change.)

(8) PRN--See §749.43(43) [~~§749.43(42)~~] of this title [~~(relating to What do certain words and terms mean in this chapter?)~~].

(9) - (14) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800606
Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 438-3437

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SUBCHAPTER O. FOSTER HOMES: HEALTH AND SAFETY REQUIREMENTS, ENVIRONMENT, SPACE AND EQUIPMENT
DIVISION 1. HEALTH AND SAFETY

40 TAC §749.2903, §749.2905

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

§749.2903. Who must conduct fire and health inspections at a foster home?

(a) All foster homes are required to obtain fire and health inspections.

(b) The requirements related to fire and health inspections for foster family homes are as follows:

(1) You must [explore all available resources, city, county, and local governments to] determine whether there is any local authority or certified fire inspector to conduct health and fire inspections. You must document all contacts with the date, name of person contacted, and the person's response to the request to complete an inspection.

(2) If no local authority or certified fire inspector exists to complete a fire inspection for the home, you must request that the state Fire Marshal's Office [to] do the inspection.

(3) If no local authority exists to complete a health inspection for the home, you must request a health inspection from the Department of State Health Services.

(4) [(3)] If, after exploring and documenting all efforts to obtain a [local or state] fire inspection for a home, you cannot obtain a fire inspection, you may use our Fire Prevention Checklist form.

(5) [(4)] If, after exploring and documenting all efforts to obtain a [local or state] health inspection for a home, you cannot obtain a health inspection, you may use our Environmental Health Checklist form.

(c) The requirements related to fire and health inspections for foster group homes are as follows:

(1) You must determine whether there is any local authority to conduct health and fire inspections. You must document all contacts with the date, name of person contacted, and the person's response to the request to complete an inspection.

(2) If no local authority exists to complete a fire inspection for the home, you must request that the state Fire Marshal's Office do the inspection.

(3) If no local authority exists to complete a health inspection for the home, you must request a health inspection from the Department of State Health Services.

(4) If, after exploring and documenting all efforts to obtain a fire inspection for a home, you cannot obtain a fire inspection, you may use our Fire Prevention Checklist form.

(5) If, after exploring and documenting all efforts to obtain a health inspection for a home, you cannot obtain a health inspection, you may use our Environmental Health Checklist form.

(d) [(b)] Once you document that [there is no entity to conduct] a health and/or fire inspection is not available in a particular area, you may use that documentation for any foster home verified by you in that area. A copy of the documentation must be on file in each foster home record to which the documentation applies.

(e) [(c)] Documentation that [there is no entity to complete] a health and/or fire inspection is not available in a particular area is valid for one year.

§749.2905. How often must fire and health inspections be conducted at a foster home?

(a) Unless otherwise stated in the report, a fire or health inspection report obtained from a [local or state fire or] health or fire authority, including a certified fire inspector, is current for:

(1) - (2) (No change.)

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800607
Gerry Williams
General Counsel
Department of Family and Protective Services
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 438-3437

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 25. TRAFFIC OPERATIONS

SUBCHAPTER D. BICYCLE ROAD USE

43 TAC §§25.50, 25.51, 25.53

The Texas Department of Transportation (department) proposes amendments to §25.50, Purpose; §25.51, Definitions; and §25.53, Bicycle Use on the State Highways.

EXPLANATION OF PROPOSED AMENDMENTS

Government Code, §2001.039, requires state agencies to readopt their rules every four years or more frequently and, prior to readopting, to consider whether the reason for adopting each rule continues to exist. In the course of reviewing the administrative rules pertaining to bicycle road use, the department identified three sections that require minor revisions.

Amendments to §25.50, Purpose, correct an outdated statutory reference and an outdated reference to a division of the chapter.

Amendments to §25.51, Definitions, correct an outdated reference to a division of the chapter.

Amendments to §25.53, Bicycle Use on the State Highways, delete paragraph (4), which relates to the preparation of a statewide comprehensive bicycle plan. When this section was originally adopted, it was considered the best practice for the department to prepare the plan. However, this work is currently accomplished by a city or county and the applicable metropolitan planning organization. Department staff members participate and provide assistance to the local entities with regard to these planning efforts.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that, for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

James Randall, Director, Transportation Planning and Programming Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the proposed amendments.

PUBLIC BENEFIT AND COST

Mr. Randall has also determined that, for each year of the first five years the amended sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be a greater understanding of the department's administrative rules regarding bicycle road use. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§25.50, 25.51, and 25.53 may be submitted to James Randall, Director, Transportation Planning and Programming Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on March 17, 2008.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (Commission) with the authority to establish rules for the conduct of the work of the department and, more specifically, Transportation Code, §201.902, which requires the Commission to adopt rules relating to the use of roads in the state highway system by bicyclists.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.902.

§25.50. Purpose.

Transportation Code, §201.902, requires [~~Texas Civil Statutes, Article 6673h, require~~] the department to adopt rules regarding bicycle road use on the state highway system. This subchapter prescribes [~~The sections under this undesignated head prescribe~~] the policies and procedures governing enhancement of the state highway system for bicycle use.

§25.51. Definitions.

The following words and terms, when used in this subchapter [~~undesignated head~~], shall have the following meanings, unless the context clearly indicates otherwise.

(1) Bicycle Advisory Committee--The committee, established under §1.85 of this title (relating to department advisory committees), that advises the commission concerning bicycle issues.

(2) Department--The Texas Department of Transportation.

(3) District--One of 25 geographical areas, managed by a district engineer, in which the department conducts its primary work activities.

(4) District bicycle coordinator--A person designated by the department to coordinate highway projects and policies of the department that might affect bicycle use on the state highway system at the district level.

(5) District Engineer--The chief administrative officer in charge of a district of the department.

(6) State bicycle coordinator--A person designated by the department to coordinate highway projects and policies of the department that might affect bicycle use on the state highway system at the state level.

§25.53. Bicycle Use on the State Highways.

The department will commence consideration of bicycle use on the state highway system by:

(1) seeking comments on policies and certain highway improvement projects from the Bicycle Advisory Committee;

(2) taking bicycle accommodation into consideration during the planning and implementation of all construction and rehabilitation projects; and

(3) compiling research related to bicycle hazards, and developing guidelines for prioritizing maintenance that takes these hazards into consideration.[~~; and~~]

[~~(4) preparing a statewide comprehensive bicycle plan that will include:~~]

[~~(A) an inventory and assessment of existing state highways to determine the most suitable facilities for bicycle use;~~]

[~~(B) a statewide route map identifying such facilities; and~~]

[~~(C) goals and objectives to enhance the state highway system to connect existing bike facilities.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800557
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 463-8683

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CHAPTER 28. OVERSIZE AND OVERWEIGHT VEHICLES AND LOADS

The Texas Department of Transportation (department) proposes amendments to §28.2, Definitions, §28.11, General Oversize/Overweight Permit Requirements and Procedures, §28.12, Single-Trip Permits Issued Under Transportation Code, Chapter 623, Subchapter D, §28.13, Time Permits, §28.14, Manufactured Housing, and Industrialized Housing and Building Permits, §28.15, Portable Building Unit Permits, §28.16, Permits for Military and Governmental Agencies, §28.30, Permits for Over Axle and Over Gross Weight Tolerances, §28.64, Annual Permits, §28.91, Responsibilities, §28.92, Permit Issuance Requirements and Procedures, §28.101, Responsibilities, and §28.102 Permit Issuance Requirements and Procedures; and new §28.110, Purpose, §28.111, Applicability, §28.112, Falsification of Information on Application and Permit, §28.113, Shipper Certificate of Weight, §28.114, Compliance with Remote Permit System, §28.115, Permits Issued by Another State, §28.116, Permit Compliance, §28.200, Purpose, §28.201, Investigations and Inspections of Records, §28.202, Records, §28.300, Purpose, §28.301, Administrative Penalties, §28.302, Administrative Sanctions, §28.303, Implications for Nonpayment of Penalties; Grounds for Action, §28.304, Administrative Proceedings, §28.305, Settlement Agreements, and §28.306, Administrative Penalty for False Information on Certificate by a Shipper all concerning oversize and overweight vehicles and loads.

EXPLANATION OF PROPOSED AMENDMENTS AND NEW SECTIONS

The proposed amendments and new sections are necessary to implement the provisions of House Bill 2093, 80th Legislature, Regular Session, 2007; to clarify existing information; update statutory references; add guidelines regarding fees and the issuance of envelope vehicle permits; and streamline the permit-issuing processes used by the Port of Brownsville and by Chambers County.

House Bill 2093 increases certain oversize and overweight permit fees and gives the department the authority to investigate, enforce, impose administrative penalties, and revoke credentials for violating statutes, rules, or orders regarding oversize and overweight limits or for providing false information on any documentation submitted to the department. The bill also authorizes the department to enter into the Unified Carrier Registration (UCR) system, which was designed to replace the Single State Registration System (SSRS) in which the state participated.

The term "temporary registration" was changed to "temporary vehicle registration" throughout 43 TAC Chapter 28 to distinguish between motor carrier registration (credentialing) and motor vehicle registration under Transportation Code, Chapter 502.

Amendments to §28.2 provide additional definitions and clarify terms used throughout this chapter and add terms used in the new enforcement process. Definitions for truck and truck-tractor are added to provide precise definitions of these two terms for the purposes of this chapter.

Amendments to §28.11 increase permit fees to comply with the provisions of House Bill 2093. The bill increased the permit fees in Transportation Code, §623.076 and the maintenance fees in Transportation Code, §623.077. References to fees in Figure 43 TAC §28.30(e)(3)(C) in this section were amended to correspond with the new statutory fees.

Section 28.11 is also amended to correct a statutory reference to the Insurance Code. The requirement for nonresident insurance agents is now located in Insurance Code, Chapter 4056, Nonresident Agent.

Amendments to §28.12 increase the fee for a single trip permit issued under Transportation Code, §623.076 to correspond with the statutory fee increase from House Bill 2093.

Amendments to §28.13 increase fees for 30-day, 60-day, and 90-day permits and annual permits for implements of husbandry and water well drilling machinery due to changes in Transportation Code, §623.076. The fee increases correspond with the statutory increases from House Bill 2093.

The amendment to §28.13(e)(4)(A)(iii) increases the fee for annual envelope vehicle permits from $2,000 to $4,000. Transportation Code, §623.071(c) and (d) states that the department may issue annual permits for the transport of overweight or oversize equipment that does not exceed 12 feet wide, 14 feet high, 110 feet long, and 120,000 pounds. These permits are commonly referred to as annual envelope permits. Before being amended by House Bill 2093, Transportation Code, §623.076(c) authorized the Texas Transportation Commission (commission) by rule to set the fee for an annual envelope permit in an amount not to exceed $3,500. The commission set the fee at $2,000. The fee for a corresponding single trip permit to transport one load was $80, which is the sum of the $30 permit fee (Transportation Code, §623.076(a)(1)) and the $50 maintenance fee (Transportation Code, §623.077(a)). Under that fee schedule, it was cost effective for customers who projected the need in one year for more than 25 single trip permits to transport loads that would qualify for an annual envelope permit to purchase the annual permit in lieu of single trip permits ($80 single trip permit fee x 25 permits = $2,000).

In general, House Bill 2093 doubled or tripled the fees for the oversize/overweight permit types issued by the department. Amendments to Transportation Code, §623.076(a)(1)and §623.077 increase the fee for a single trip permit for loads comparable to those allowed under an annual envelope permit from $80 to $210. Additionally, the bill doubled the maximum provided for annual envelope permits under Transportation Code, §623.076(c) to $7,000. Without an increase in the fee for an annual envelope permit the break-even point decreases from 25 to about 10 single trip permits. Increasing the fee for an annual envelope permit to $4,000 provides a break-even point at about 19 single trip permits, which is much closer to the original fee structure.

New §28.13(e)(4)(C), (D), and (E) aid the department in decreasing the number of fraudulent requests for replacement of an original annual envelope vehicle permit--company specific, by providing an audit trail when the first permit is received. This type of permit is to be carried in only one vehicle at a time. Fraudu-

lent requests occur when an applicant desires to operate multiple vehicles simultaneously without paying additional permit fees. Without an audit trail, the department is forced to honor each permit replacement request, at the expense of lost revenue to the state.

The seven-day waiting period for receipt of the initial permit is to allow more than reasonable time for the customer to receive the permit, regardless of how remote an address may be. Registered mail and overnight delivery services normally take less than five days. During this seven-day period, permit replacement requests will not be accepted or considered. The 10-day waiting period after the date the permit is issued, for initiation of a request for replacement, simply adds three days to allow sufficient time for tracking records to be in place before a request can be reviewed. These periods are to maintain a timely response process.

Currently, there is nothing in the rules that allows the department to refuse fraudulent requests for duplicate permits. This amendment levels the playing field for customers, including those who do pay for multiple permits to legally operate multiple trucks. It also allows the department to collect more fees that are used to repair road damage caused by these oversize/overweight loads.

The amendment to §28.14(d) increases the fee for a manufactured housing and industrialized housing and building oversize/overweight permit, to comply with the changes to Transportation Code, §623.096(a).

The amendment to §28.15(d) increases the fee for a portable building unit oversize/overweight permit, to comply with the changes to Transportation Code, §623.124(a).

Amendments to §28.16 clarify existing language to state that military and government agencies are eligible for all oversize/overweight permits issued by the department, that military and government entities do not have to pay the permit fee as long as the load is transported on vehicles with exempt license plates, and that all permit restrictions and requirements apply. The language currently implies that only route restricted oversize and overweight permits were available to government and military entities free of charge. Additional changes were made to this section to correct references to other subchapters of 43 TAC Chapter 28.

The amendment to the figure in §28.30 increases annual permit fees for over axle and over gross weight tolerances to comply with the new provisions of Transportation Code, §623.0111(a)(2).

The amendment to §28.64 increases annual unladen lift permit fees to comply with the new provisions of Transportation Code, §623.182.

Amendments to 43 TAC Chapter 28, Subchapter G, Port of Brownsville Port Authority Permits and Subchapter H, Chambers County Permits make the language of the subchapters more consistent with each other. The Port of Brownsville and Chambers County both are statutorily authorized to issue overweight and oversize permits for specific roadways in their jurisdictions. The two programs are handled in the same manner so the provisions for each subchapter should be consistent.

Amendments to §28.91 and §28.101 allow the department to determine if a bond is necessary to offset the cost of maintenance. Under this change the department may require the bond only if the sale of permits has not generated sufficient funds to cover the cost of the roadway maintenance. The Port of Brownsville permit sales have established that the continued requirement of the bond is unnecessary because sufficient maintenance funds have been available from the permit fees. The change to this rule allows the department to waive the bond requirement.

All other amendments to §28.91, §28.92, §28.101 and §28.102 make the requirements and language consistent between Port of Brownsville Authority Permits and Chambers County Permits, reorganize the sections so that the information is in a more understandable format, clarify the existing language, and update processes that have recently been automated. The changes include deleting the name of the employee who issued the permit from the permit requirements because most permits are processed automatically without employee involvement in the process. The language is amended to clarify that the funds must be deposited into the state highway fund as required by statute. This change also requires an amendment to the maintenance contract requirements to remove the requirement that the permitting entity make payments to the department for maintenance.

New Subchapter I, Compliance, sets out the procedures for citing violations related to the operation of vehicles on public roadways in excess of maximum weight, height, and width requirements.

New §28.110, Purpose, provides the purpose of the new subchapter.

New §28.111, Applicability, provides that a person operating on a public roadway without an oversize or overweight permit shall comply with the weight and size restrictions of Transportation Code, Chapters 621, 622, and 623. This section also requires a person operating a vehicle under an overweight or oversize permit to comply with all the provisions of the permit. This section is added to provide notification to motor carriers and other operating oversize and overweight vehicles that failure to obtain a required permit or to abide by the provisions and conditions of the issued permit could lead to enforcement actions.

New §28.112, Falsification of Information on Application and Permit, provides that a person who gives false information on a permit application or other required forms commits a violation that is subject to enforcement under Subchapter K, Enforcement. The new section also prohibits a person from altering a permit issued by the department or counterfeiting a permit. This section is added to ensure that the public understands that failure to provide correct information when requesting a permit can lead to enforcement action.

New §28.113, Shipper Certificate of Weight, provides the requirements for a shipper's certificate of weight to be valid. The certificate is authorized by Transportation Code, §623.274, as added by House Bill 2093. The new certificate can be used by the permit holder to provide an affirmative defense to permit violations based on weight of the commodity being transported. The new section requires that the permit holder obtain the shipper's certification before applying for the permit and that the shipper certify that the information on the certificate is correct.

New §28.114, Compliance with Remote Permit System, provides guidance for persons authorized by contract to access the electronic application process. This new section grants the department the authority to seek administrative sanctions against a person who does not comply with the terms of the contract and the conditions of the permits.

New §28.115, Permits Issued by Another State, provides that a permit issued by another state under a reciprocal agreement is subject to all provisions of 43 TAC Chapter 28 and to the applicable provisions of Transportation Code, Chapters 621, 622, and 623. This new section will allow the department to enforce the department's overweight and oversize permit rules for permits issued under the reciprocal agreements.

New §28.116, Permit Compliance, provides that a permit issued under this chapter is invalid immediately upon violation of a rule, condition, or requirement placed on the permit. The rule clarifies that once the permit is invalid, movement of the overweight or oversize vehicle over a public roadway is no longer authorized and may lead to enforcement action.

New Subchapter J, Records and Inspections, provides requirements for how applicable records must be maintained and how long the records are to be maintained, and describes the department's procedures for examining the records.

New §28.200, Purpose, provides the justification for the new subchapter.

New §28.201, Investigations and Inspections of Records, sets out that the department can enter a person's place of business during normal business hours to investigate violations under Transportation Code, Chapter 621, 622, or 623 or 43 TAC Chapter 28. The department must have access to the person's records to investigate any potential violations. The section provides that the inspector will provide proof of the inspector's authority to inspect the records by presenting credentials and a written statement from the department indicating the authority. In addition the section also provides that the department can designate a time and location for the inspection of the records if the time and location cannot be agreed upon by the parties involved. This authority will prevent a person from avoiding administrative sanctions by prohibiting access to the records necessary to conduct an investigation.

New §28.202, Records, provides what records must be maintained and where the records must be located. The records include those types of records used by motor carriers in their daily operation that relate to the movement and weight of shipments and other records required elsewhere in 43 TAC Chapter 28 or the Transportation Code. This section requires that the records be maintained not less than two years at the person's principal business address. This section also requires that a copy of the permit be maintained in the vehicle for which the permit was issued during the period that the permit is being used. These requirements will ensure that the records necessary for the department to investigate overweight and oversize violations are maintained by the person and are available for inspection when needed.

New Subchapter K, Enforcement, is added to provide the administrative process for enforcement actions for violations of 43 TAC Chapter 28. House Bill 2093 authorized the department to take administrative action against motor carriers or individuals who violate the weight and size restrictions for vehicles or violate a provision of an overweight or oversize permit.

New §28.300, Purpose, lists the purpose of the new subchapter.

New §28.301, Administrative Penalties, describes the administrative penalties the department will seek for violations of 43 TAC Chapter 28. This section sets out the amounts of penalties, not to exceed $5,000 for each violation or $15,000 if the person knowingly committed the violation. The penalties in this section comply with the penalties of Transportation Code, §643.251. This section also provides that the penalty recommendation will be based on certain factors including the seriousness of the violation, economic harm, history of previous violations, amount necessary to deter future violations, efforts to correct violations, and any other matters that justice may require. These factors are the same factors used under 43 TAC Chapter 18, for similar motor carrier enforcement procedures.

New §28.302, Administrative Sanctions, describes the administrative sanctions the department may seek for violations of 43 TAC Chapter 28. House Bill 2093 authorized the department to revoke, suspend, or deny overweight and oversize permits if the person violates any provision of 43 TAC Chapter 28 or Transportation Code, Chapters 621, 622, or 623. This section also provides the guidelines for the probation of a suspension of a permit. These guidelines will help ensure that the department is consistent in administering the probation program.

New §28.303, Implications for Nonpayment of Penalties; Grounds for Action, provides that if the person fails to pay an administrative penalty assessed under this subchapter the department may not issue oversize or overweight permits to the individual. As authorized by House Bill 2093, this provision will prevent a person from ignoring penalty obligations by requiring that they pay prior penalties before a new permit can be issued.

New §28.304, Administrative Proceedings, is added to provide the notice requirements for the new administrative hearing process. The language tracks Transportation Code, §643.2525 and clarifies the two types of notices mailed to the alleged violator.

New §28.305, Settlement Agreements, details the settlement agreement process. The department may enter into a compromise settlement agreement with an alleged violator any time before the issuance of a final order. This section provides that the agreement must include a clause that allows the department the authority to revoke the agreement if the alleged violator fails to abide by the terms of the agreement. This provision will ensure that the department continues to have authority to enforce future compliance.

New §28.306, Administrative Penalty for False Information on Certificate by a Shipper, provides that the department may investigate and impose penalties against a shipper who provides false information on a shipper's certificate of weight. This section provides for how the notice and hearing requirements will be handled and how the amount of administrative penalties will be determined.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments and new sections as proposed are in effect, there will be fiscal implications for state or local governments as a result of enforcing or administering the amendments and new sections. Transportation Code, §623.076(c) provides for an annual permit fee established by the commission with a not-to-exceed amount. Prior to September 1, 2007, the statute allowed that fee to be set up to $3,500, and the commission set the fee at $2,000. From that $2,000 fee, $1,000 went to General Revenue (GR) and $1,000 to the State Highway Fund (SHF). House Bill 2093, 80th Legislature, increased that not-to-exceed amount to $7,000, and this rule would set the fee at $4,000. From that amount, $1,000 will continue to go to GR, and $3,000 will go to the SHF resulting in an increase of $2,000 per permit to the SHF. Using Fiscal 2007 as a base, and

assuming an annual increase in volume of 10% per year, that increase is estimated to produce the following revenue increases to the SHF during the next five years: 2008 - $4,000,000, 2009 - $13,200,000, 2010 - $14,520,000, 2011 - $15,972,000, and 2012 - $17,569,200, for a total increase during the five years of $65,261,200. The additional revenue will be used to offset the increasing cost of labor and materials to repair the damage to highways done by oversize and overweight loads.

Carol Davis, Director, Motor Carrier Division has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments and new sections.

PUBLIC BENEFIT AND COST

Ms. Davis has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments and new sections will be the implementation of the legislation referenced in this preamble, clarification of existing information used in this chapter regarding requirements for motor carriers, the updating of statutory references, the addition of guidelines regarding issuance of certain permits, the streamlining of permit-issuance, and the increased protection of the traveling public and the transportation infrastructure.

Fees set by administrative rule are subject to Government Code, §2006.002, which requires the agency to prepare an economic impact statement that assesses the potential impact of the proposed rule on small businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule.

Government Code, §2006.002 further describes a "small business" as an entity that is: (1) for profit; (2) independently owned and operated; and (3) has fewer than 100 employees or less than $6 million in annual gross receipts. Further, based on guidance provided by the Office of the Attorney General, agencies are not required to provide an exact accounting of the number of small business that may be affected by the proposed rule, but may report such numbers as an approximation such as "more than" or a "range" of numbers.

The department issues permits for the transport of oversize and overweight vehicles and loads under the authority of Transportation Code, Chapter 623. The issuance of those permits helps ensure that oversize/overweight loads are routed on roadways and structures capable of carrying the loads and allows for the collection of permit fees to help offset costs associated with the disproportionate impact that the loads have on the transportation system. The issuance of oversize/overweight permits helps to ensure the safe, effective, and efficient movement of goods while protecting the traveling public and the integrity of Texas' transportation infrastructure.

In accordance with state statutes, the department issues 23 different types of permits for various types of loads. Those permits are valid for varying lengths of time, such as single-trip permits and annual permits. In acknowledgement of the economic impacts of quality permitting services on the motor carrier industry and the economy as a whole, the legislature amended portions of Transportation Code, Chapter 623 with the passage of House Bill 2093 during the 80th Regular Session. Among other amendments, House Bill 2093 prescribes increased fees for the majority of the permit types issued by the department that provide additional funds to offset infrastructure damage caused by oversize/overweight loads and to provide funding for additional resources needed to improve the department's permitting services.

In fiscal year 2007 the department issued more than 554,000 oversize/overweight permits. The volume of permits issued by the department grew 33 percent between fiscal years 2003 and 2007, with a projected growth rate of 6 percent from fiscal year 2007 to fiscal year 2008. The issuance of multiple single trip permits is more time-consuming and, therefore, more costly to the department than annual permits. Annual envelope permits provide an efficient and cost-effective way for the department to meet overall increased permit demands, use personnel resources, and collect permit fees for the transport of loads within a very limited size and weight "envelope." The issuance of annual envelope permits, rather than comparable single trip permits, allows the department to better protect the safety of the traveling public and the transportation infrastructure by focusing limited personnel resources on those permits required for heavier and larger loads than those allowed with annual envelope permits.

In fiscal year 2007 Texas issued 5,457 annual envelope permits. Based on historic and projected growth rates, the department assumes that sales of these permits will increase by 6 percent for a total of 5,784 permits in fiscal year 2008.

Due to the competitive nature of the motor carrier and permitting industries, obtaining relevant and accurate information regarding the number of employees and annual gross receipts of these permit customers is difficult at best. However, an indication of whether or not these permit customers qualify as "small businesses" can be obtained through relevant motor carrier registration data, as the vast majority of permit applicants are required to register as motor carriers before obtaining an oversize/overweight permit. In fiscal year 2007 the department registered over 50,000 motor carriers operating over 350,000 vehicles of the type that could conceivably be used to transport an oversize or overweight load. Using these figures, the average fleet operated by Texas registered motor carriers consists of seven vehicles. Based on an average motor carrier fleet size of seven vehicles, the department concludes that the vast majority of these permits are issued to businesses that have "fewer than 100 employees" and qualify as a small business under Government Code, §2006.002. Accordingly, the analysis of the projected costs are based on all anticipated permit sales.

Based on sales of 5,457 permits and a permit fee of $2,000, customers who purchased an annual envelope permit spent a total of $10,914,000 in fiscal year 2007. Increasing the permit fee to $4,000 and taking into account projected growth rates will result in the following economic impacts to small businesses:

5,457 permits issued in FY 2007 x projected 6% annual growth rate = 5,784 permits anticipated for fiscal year 2008;

5,784 permits x $4,000 permit fee = $23,137,680 in fiscal year 2008;

$23,137,680 - $11,568,000 = $11,569,680 total increased cost to customers.

Therefore, economic impacts to small businesses are projected to be $23,137,680 in fiscal year 2008, representing a net increase of $11,569,680 over fiscal year 2007 and an increased cost per permit customer of $2,000. A small business owner who owns seven trucks could see a cost increase of $14,000 from fiscal year 2007 to fiscal year 2008 if the business owner obtains an annual permit for each vehicle.

It should be noted that the decision to purchase an annual envelope permit, versus the $210 single trip permit to transport comparable loads, is a business decision made by permit customers based on each customer's unique needs. As the proposed annual envelope permit fee of $4,000 is equivalent to the cost of 19 single trip permits ($4,000/$210), it would not make sense economically for permit customers who anticipate transporting fewer than 19 comparable loads to choose an annual envelope permit over single trip permits. Those customers who anticipate transporting more than 19 comparable oversize/overweight loads annually may choose to take advantage of the comparatively lower-priced annual envelope permit.

Government Code, §2006.002 requires that agencies prepare a regulatory flexibility analysis to analyze alternatives to the proposed rule. These alternatives should be consistent with the health, safety, and environmental and economic welfare of the state; accomplish the objectives of the rule; and minimize adverse impacts on small businesses. The department analyzed several alternatives to meet the goals outlined above.

In preparing the amendments to this rule the department considered a sliding permit fee scale instead of an across the board permit fee increase. The fee scale considered was based on actual or projected mileage traveled by vehicles operating with an annual envelope permit, similar to the fee structure used by customers who purchase quarterly hubometer permits under 43 TAC §28.62. Under that fee structure, customers must attach a hubometer to permitted vehicles, which captures the actual mileage traveled by the vehicle.

This option raised several implementation issues. Vehicles that are operated under a quarterly hubometer permit are fundamentally different than those vehicles used to transport oversize/overweight loads falling within the parameters of an annual envelope permit. Quarterly hubometer permit customers operate mobile cranes and these vehicles always exceed legal size and weight limits. Vehicles operated under annual envelope permits may also transport legal loads with regard to size and weight, so that the total mileage traveled by the vehicle would not necessarily correspond to the total mileage traveled while transporting oversize or overweight loads.

With or without a hubometer to track actual mileage, recordkeeping to ascertain mileage traveled while transporting oversize/overweight loads would increase the regulatory burden and associated costs to small businesses over the cost of the proposed rule. Depending on the cost per mile, this alternative may actually increase permit fees over those currently proposed.

This alternative is also not consistent with the economic welfare of the state, as the personnel resources needed to track this type of data and issue permits based on mileage are significantly higher than resources needed to issue an annual permit that is not based on mileage. Additionally, the department anticipates that the issuance of a permit with this fee structure would increase the volume of complaints received by the Motor Carrier Division's Compliance and Enforcement Section regarding carriers who are allegedly "underreporting" actual mileage traveled under this fee alternative. This would necessitate increased personnel resources needed to process and investigate complaints and to manage administrative enforcement actions. This alternative is not recommended.

The department also considered retaining the current permit fee. While this alternative would decrease costs to small businesses, it would not be consistent with the health, safety, and environmental and economic welfare of the state, nor would it accomplish the objectives of the rule. The objective of the rule is to provide an annual permit to transport loads that are somewhat oversize or overweight in an efficient manner while allowing the department personnel resources to focus on larger and heavier loads that present significantly increased risks to the public and infrastructure, in a manner that allows for the collection of permit fees to help offset costs associated with the disproportionate impact such loads have on the transportation system. At a fee of $2,000, the cost of an annual envelope permit would be equal to the cost of roughly 10 single trip permits at $210 each. Essentially, after transporting 10 oversize/overweight loads with an annual envelope permit, the remainder of loads transported within the same year would be "free." Implementing this alternative would defeat the purpose of charging permit fees to offset associated damage costs. This alternative is also not consistent with the Legislature's stated purpose for passing House Bill 2093, "to provide a significant increase in revenue realized by this state from increased permit fees, a portion of which will be used to address the growing problem of the untimely issuance of oversize and overweight permits..." This alternative is not recommended.

Transportation Code, §623.071(c) and (d), does not require the issuance of an annual envelope permit. In the rule proposal process the department considered discontinuing annual envelope permits. This alternative would require customers who would normally purchase an annual permit to purchase single trip permits at a cost of $210 per permit. Depending upon the number of loads transported by a particular customer, this alternative could substantially increase costs associated with permit fees to small businesses.

Additionally, implementation of this alternative would not be consistent with the economic welfare of the state or accomplish the objective of the rule. As single trip permits are more difficult and time-consuming to issue than annual permits, without commensurate staff increases implementation of this alternative would increase permit turnaround times for all permit customers. Permit turnaround times have a direct financial impact to customers, as it affects the volume of oversize/overweight loads a particular customer can transport within any given timeframe, and increases costs associated with "downtime" for a permit customer's vehicles and associated personnel. This is not the recommended alternative.

For these reasons the rule is amended to increase the fee for an annual envelope permit from $2,000 to $4,000. Through this small business study the department has determined that the implementation of this fee increase: is consistent with fee schedules adopted by the Texas Legislature under House Bill 2093; allows for the collection of permit fees to help offset costs associated with the disproportionate impact such loads have on the transportation system at a reasonable ratio (19:1 versus 9.5:1 under the legislatively-amended single trip permit fee structure); allows the department to maintain the efficiency and safety benefits associated with issuing annual permits; is consistent with the safety and economic welfare of the state; and minimizes adverse impacts to small businesses while providing a good value for customers who transport multiple loads within the prescribed size and weight envelope.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §28.2, §§28.11 - 28.16, §28.30, §28.64, §§28.91 - 28.92, and §§28.101 - 28.102, and new §§28.110 - 28.116, §§28.200 - 28.202, and

§§28.300 - 28.306 may be submitted to Carol Davis, Director, Motor Carrier Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on March 17, 2008.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §28.2

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §623.076(c), which authorizes the commission to establish the fee for certain oversize or overweight permits.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 621, 622, 623, and 643.

§28.2. Definitions.

The following words and terms, when used in this chapter, will have the following meanings, unless the context clearly indicates otherwise.

(1) - (37) (No change.)

(38) Nondivisible load--A load that cannot be reduced to a smaller dimension without compromising the integrity of the load or requiring more than eight hours of work using appropriate equipment to dismantle.

(39) [~~(38)~~] Oil field rig-up truck--An unladen vehicle with an overweight single steering axle, equipped with a winch and set of gin poles used for lifting, erecting, and moving oil well equipment and machinery.

(40) [~~(39)~~] Oil well servicing unit--An oil well clean-out unit, oil well drilling unit, or oil well swabbing unit, which is mobile equipment, either self-propelled or trailer-mounted, constructed as a machine used solely for cleaning-out, drilling, servicing, or swabbing oil wells, and consisting in general of, but not limited to, a mast, an engine for power, a draw works, and a chassis permanently constructed or assembled for this purpose.

(41) [~~(40)~~] One trip registration--Temporary vehicle registration issued under Transportation Code, §502.354.

(42) [~~(41)~~] Overdimension load--A vehicle, combination of vehicles, or vehicle and its load that exceeds maximum legal width, height, length, overhang, or weight as set forth by Transportation Code, Chapter 621, Subchapters B and C.

(43) [~~(42)~~] Overhang--The portion of a load extending beyond the front or rear of a vehicle or combination of vehicles.

(44) [~~(43)~~] Overheight--An overdimension load that exceeds the maximum height specified in Transportation Code, §621.207.

(45) [~~(44)~~] Overlength--An overdimension load that exceeds the maximum length specified in Transportation Code, §621.203, §621.204, §621.205, and §621.206.

(46) [~~(45)~~] Overweight--An overdimension load that exceeds the maximum weight specified in Transportation Code, §621.101.

(47) [~~(46)~~] Overwidth--An overdimension load that exceeds the maximum width specified in Transportation Code, §621.201.

(48) [~~(47)~~] Permit--Authority for the movement of an overdimension load, issued by the MCD under Transportation Code, Chapter 623.

(49) [~~(48)~~] Permit account card (PAC)--A debit card that can only be used to purchase a permit or temporary vehicle registration and which is issued by a financial institution that is under contract to the department and the Comptroller of Public Accounts.

(50) [~~(49)~~] Permit officer--An employee of the MCD who is authorized to issue an oversize/overweight permit or temporary vehicle registration.

(51) [~~(50)~~] Permit plate--A license plate issued under Transportation Code, §504.504, to a crane or an oil well servicing vehicle.

(52) [~~(51)~~] Permitted vehicle--A vehicle, combination of vehicles, or vehicle and its load operating under the provisions of a permit.

(53) [~~(52)~~] Permittee--Any person, firm, or corporation that is issued an oversize/overweight permit or temporary vehicle registration by the MCD.

(54) [~~(53)~~] Pipe box--A container specifically constructed to safely transport and handle oil field drill pipe and drill collars.

(55) [~~(54)~~] Portable building compatible cargo--Cargo, other than a portable building unit, that is manufactured, assembled, or distributed by a portable building unit manufacturer and is transported in combination with a portable building unit.

(56) [~~(55)~~] Portable building unit--The pre-fabricated structural and other components incorporated and delivered by the manufacturer as a complete inspected unit with a distinct serial number whether in fully assembled, partially assembled, or kit (unassembled) configuration when loaded for transport.

(57) [~~(56)~~] Principal--The person, firm, or corporation that is insured by a surety bond company.

(58) [~~(57)~~] Recyclable materials--Material that has been recovered or diverted from the solid waste stream for purposes of reuse, recycling, or reclamation, a substantial portion of which is consistently used in the manufacture of products which may otherwise be produced using raw or virgin materials. Recycled material is not solid waste unless the material is deemed to be hazardous solid waste by the Administrator of the United States Environmental Protection Agency, whereupon it shall be regulated accordingly unless it is otherwise exempted in whole or in part from regulation under the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. Section 6901 et seq.), by Environmental Protection Agency regulation. However, recyclable material may become solid waste at such time, if any, as it is abandoned or disposed of rather than recycled, whereupon it will be solid waste with respect only to the party actually abandoning or disposing of the material.

(59) [~~(58)~~] Registration reduction--A 25% reduction of the permit fee that applies to a crane or oil well servicing unit registered for maximum legal weight.

(60) Shipper--Person who consigns the movement of a shipment.

(61) Shipper's certificate of weight--A form approved by the department in which the shipper certifies to the maximum weight of the shipment being transported.

(62) [~~(59)~~] Single axle--An assembly of two or more wheels whose centers are in one transverse vertical plane or may be included between two parallel transverse planes 40 inches apart extending across the full width of the vehicle.

(63) [~~(60)~~] Single state registration (SSR)--Interstate registration authority issued to motor carriers under authority of 49 U.S.C. §14504 and Transportation Code, Chapter 645.

(64) [~~(61)~~] Single-trip permit--A permit issued for an overdimension load for a single continuous movement over a specific route for an amount of time necessary to make the movement.

(65) [~~(62)~~] State highway--A highway or road under the jurisdiction of the Texas Department of Transportation.

(66) [~~(63)~~] State highway system--A network of roads and highways as defined by Transportation Code, §221.001.

(67) [~~(64)~~] Surety bond--An agreement issued by a surety bond company to a principal that pledges to compensate the department for any damage that might be sustained to the highways and bridges by virtue of the operation of the equipment for which a permit was issued. A surety bond is effective the day it is issued and expires at the end of the state fiscal year, which is August 31st. For example, if you obtain a surety bond on August 30th, it will expire the next day at midnight.

(68) [~~(65)~~] Tare weight--The empty weight of any vehicle transporting an overdimension load.

(69) [~~(66)~~] Temporary vehicle registration--A 72-hour temporary vehicle registration, 144-hour temporary vehicle registration, or one-trip registration, as defined by Transportation Code, §502.352.

(70) [~~(67)~~] Three-axle group--Any three consecutive axles, having at least 40 inches from center of axle to center of axle, whose extreme centers are not more than 144 inches apart, and are individually attached to or articulated from, or both, to the vehicle by a weight equalizing suspension system.

(71) [~~(68)~~] Time permit--A permit issued for a specified period of time under §28.13 of this title (relating to Time Permits issued under Transportation Code, Chapter 623, Subchapter D) and in accordance with Transportation Code, Chapter 623.

(72) [~~(69)~~] Traffic control device--All traffic signals, signs, and markings, including their supports, used to regulate, warn, or control traffic.

(73) [~~(70)~~] Trailer mounted unit--An oil well clean-out, drilling, servicing, or swabbing unit mounted on a trailer, constructed as a machine used for cleaning out, drilling, servicing, or swabbing oil wells, and consisting in general of, but not limited to, a mast, an engine for power, a draw works, and a chassis permanently constructed or assembled for this purpose.

(74) Truck--A motor vehicle designed, used, or maintained primarily for the transportation of property.

(75) Truck-tractor--A motor vehicle designed or used primarily for drawing another vehicle:

(A) that is not constructed to carry a load other than a part of the weight of the vehicle and load being drawn; or

(B) that is engaged with a semitrailer in the transportation of automobiles or boats and that transports the automobiles or boats on part of the truck-tractor.

(76) [~~(71)~~] Trunnion axle--Two individual axles mounted in the same transverse plane, with four tires on each axle, that are connected to a pivoting wrist pin that allows each individual axle to oscillate in a vertical plane to provide for constant and equal weight distribution on each individual axle at all times during movement.

(77) [~~(72)~~] Trunnion axle group--Two or more consecutive trunnion axles whose centers are at least 40 inches apart and which are individually attached to or articulated from, or both, to the vehicle by a weight equalizing suspension system.

(78) [~~(73)~~] Two-axle group--Any two consecutive axles whose centers are at least 40 inches but not more than 96 inches apart and are individually attached to or articulated from, or both, to the vehicle by a weight equalizing suspension system.

(79) [~~(74)~~] Unit--Oil well clean-out unit, oil well drilling unit, oil well servicing unit, and/or oil well swabbing unit.

(80) [~~(75)~~] Unladen lift equipment motor vehicle--A motor vehicle designed for use as lift equipment used solely to raise, shift, or lower heavy weights by means of a projecting, swinging mast with an engine for power on a chassis permanently constructed or assembled for such purpose.

(81) [~~(76)~~] Variable load suspension axles--Axles, whose controls must be located outside of and be inaccessible from the driver's compartment, that can be regulated, through the use of hydraulic and air suspension systems, mechanical systems, or a combination of these systems, for the purpose of adding or decreasing the amount of weight to be carried by each axle during the movement of the vehicle.

(82) [~~(77)~~] Vehicle--Every device in or by which any person or property is or may be transported or drawn upon a public highway, except devices used exclusively upon stationary rails or tracks.

(83) [~~(78)~~] Vehicle identification number--A unique and distinguishing number assigned to a vehicle by the manufacturer or by the department in accordance with §17.3(b) of this title (relating to Motor Vehicle Certificates of Title) for the purpose of identification.

(84) [~~(79)~~] Vehicle supervision fee--A fee required by Transportation Code, §623.078, paid by the permittee to the department, designed to recover the direct cost of providing safe transportation of a permit load exceeding 200,000 pounds gross weight over a state highway, including the cost for bridge structural analysis, monitoring the progress of the trip, and moving and replacing traffic control devices.

(85) [~~(80)~~] Water Well Drilling Machinery--Machinery used exclusively for the purpose of drilling water wells, including machinery that is a unit or a unit mounted on a conventional vehicle or chassis.

(86) [~~(81)~~] Weight-equalizing suspension system--An arrangement of parts designed to attach two or more consecutive axles to the frame of a vehicle in a manner that will equalize the load between the axles.

(87) [~~(82)~~] Windshield sticker--Identifying insignia indicating that an over axle/over gross weight tolerance permit has been issued in accordance with Subchapter C of this chapter (relating to Permits for Over Axle and Over Gross Weight Tolerances) and Transportation Code, §623.011.

(88) [~~(83)~~] Year--A time period consisting of 12 consecutive months that commences with the "movement to begin" date stated in the permit.

(89) [~~(84)~~] 72-hour temporary vehicle registration--Temporary vehicle registration issued by the MCD authorizing a vehicle to operate at maximum legal weight on a state highway for a period not longer than 72 consecutive hours, as prescribed by Transportation Code, §502.352.

(90) [~~(85)~~] 144-hour temporary vehicle registration--Temporary vehicle registration issued by the MCD authorizing a vehicle to operate at maximum legal weight on a state highway for a period not longer than 144 consecutive hours, as prescribed by Transportation Code, §502.352.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800558
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 463-8683

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SUBCHAPTER B. GENERAL PERMITS

43 TAC §§28.11 - 28.16

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §623.076(c), which authorizes the commission to establish the fee for certain oversize or overweight permits.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 621, 622, 623, and 643.

§28.11. General Oversize/Overweight Permit Requirements and Procedures.

(a) (No change.)

(b) Prerequisites to obtaining an oversize/overweight permit. Unless exempted by law or this chapter, the following requirements must be met prior to the issuance of an oversize/overweight permit.

(1) (No change.)

(2) Vehicle registration. A vehicle registered with a permit plate will not be issued an oversize/overweight permit under this subchapter. A permitted vehicle operating under this subchapter must be registered with one of the following types of vehicle registration:

(A) (No change.)

(B) Texas temporary vehicle registration;

(C) - (D) (No change.)

(c) Permit application.

(1) - (2) (No change.)

(3) All permit applications shall be accompanied by the appropriate fees described in this paragraph, in a payment method described in subsection (f) of this section.

(A) The fee for a single trip (not exceeding 80,000 pounds) permit is $60 [~~$30~~]. Fees for other types of permits are indicated in the appropriate subchapters of this chapter.

(B) Highway maintenance fees are as indicated in the following table, and are in addition to the permit fee.
Figure: 43 TAC §28.11(c)(3)(B)

(C) Vehicle supervision fees are as indicated in the following table, and are in addition to the permit fee and the highway maintenance fee.
Figure: 43 TAC §28.11(c)(3)(C) (No change.)

(4) - (5) (No change.)

(d) - (m) (No change.)

(n) Surety bonds.

(1) General. The following conditions apply to surety bonds specified in Transportation Code, §623.075.

(A) The surety bond must:

(i) - (v) (No change.)

(vi) A non-resident agent with a valid Texas insurance license may issue a bond on behalf of an authorized insurance company when in compliance with Insurance Code, Chapter 4056 [~~Article 21.11~~].

(B) - (D) (No change.)

(2) (No change.)

§28.12. Single-Trip Permits Issued Under Transportation Code, Chapter 623, Subchapter D.

(a) (No change.)

(b) Overweight loads.

(1) (No change.)

(2) The applicant shall pay, in addition to the single-trip permit fee of $60 [~~$30~~], the applicable highway maintenance fee described in §28.11(c)(3)(B) of this subchapter.

(3) - (10) (No change.)

(c) Drill pipe and drill collars hauled in a pipe box.

(1) - (4) (No change.)

(5) The permit will be issued for a single-trip only, and the fee will be $60 [~~$30~~]. For loads over 80,000 pounds, a highway maintenance fee will be charged as specified in §28.11(c)(3)(B) of this subchapter.

(6) - (7) (No change.)

(d) - (e) (No change.)

§28.13. Time Permits.

(a) (No change.)

(b) 30, 60, and 90 day permits. The following conditions apply to time permits issued for overwidth or overlength loads, or overlength vehicles, under this section.

(1) Fees. The fee for a 30-day permit is $120 [~~$60~~]; the fee for a 60-day permit is $180 [~~$90~~]; and the fee for a 90-day permit is $240 [~~$120~~]. All fees are payable in accordance with §28.11(f) of this subchapter. All fees are non-refundable.

(2) - (3) (No change.)

(4) Registration requirements for permitted vehicles. The permitted vehicle must be registered in accordance with Transportation Code, Chapter 502, for maximum weight for the vehicle or vehicle combination as set forth by Transportation Code, §502.151. Time

permits will not be issued to a vehicle or vehicle combination that is registered with temporary vehicle registration.

(5) - (10) (No change.)

(c) - (d) (No change.)

(e) Annual permits.

(1) (No change.)

(2) Implements of husbandry. An annual permit may be issued for an implement of husbandry being moved by a dealer in those implements, and for harvesting equipment being moved as part of an agricultural operation. Permits issued under this paragraph are subject to the conditions described in paragraph (1) of this subsection.

(A) The fee for a permit issued under this paragraph is $270 [~~$135~~], plus the highway maintenance fee specified in Transportation Code, §623.077 and §28.11(c)(3)(B) of this subchapter.

(B) - (E) (No change.)

(3) Water well drilling machinery. The department may issue annual permits under Transportation Code, §623.071, for water well drilling machinery and equipment that cannot be reasonably dismantled. Permits issued under this paragraph are subject to the conditions described in paragraph (1) of this subsection.

(A) The fee for a permit issued under this paragraph is $270 [~~$135~~], plus the highway maintenance fee specified in Transportation Code, §623.077, and §28.11(c)(3)(B) of this subchapter, for an overweight load.

(B) - (E) (No change.)

(4) Envelope vehicle permits.

(A) The department may issue an annual permit under Transportation Code, §623.071(c), to a specific vehicle, for the movement of superheavy or oversize equipment that cannot reasonably be dismantled. Unless otherwise noted, permits issued under this paragraph are subject to the conditions described in paragraph (1) of this subsection.

(i) - (ii) (No change.)

(iii) The fee for an annual envelope vehicle permit is $4,000 [~~$2,000~~], and is non-refundable.

(iv) - (ix) (No change.)

(x) A single trip permit, as described in §28.12 of this subchapter (relating to Single Trip Permits Issued Under Transportation Code, Chapter 623, Subchapter D), may be used in conjunction with an annual permit issued under this paragraph for the movement of vehicles or loads exceeding the height or width limits established in subparagraph (A) of this paragraph. The department will indicate the annual permit number on any single trip permit to be used in conjunction with a permit issued under this paragraph, and permittees will be assessed a fee of $60 [~~$30~~] for the single trip permit.

(B) (No change.)

(C) An annual envelope permit issued under subparagraph (B) of this paragraph will be sent to the permittee via registered mail, or at the permittee's request and expense overnight delivery service. This permit may not be duplicated. This permit will be replaced only if:

(i) the permittee did not receive the original permit within seven business days after its date of issuance;

(ii) a request for replacement is submitted to the department within 10 business days after the original permit's date of issuance; and

(iii) the request for replacement is accompanied by a notarized statement signed by a principle or officer of the permittee acknowledging that the permittee understands the permit may not be duplicated and that if the original permit is located, the permittee must return either the original or replacement permit to the department.

(D) A request for replacement of a permit issued under subparagraph (B) of this paragraph will be denied if the department can verify that the permittee received the original.

(E) Lost, misplaced, damaged, destroyed, or otherwise unusable permits will not be replaced. A new permit will be required.

(5) - (7) (No change.)

§28.14. Manufactured Housing, and Industrialized Housing and Building Permits.

(a) - (c) (No change.)

(d) Payment of permit fee. The cost of the permit is $40 [~~$20~~], payable in accordance with §28.11(f) of this subchapter (relating to General Oversize/Overweight Permit Requirements and Procedures).

(e) - (f) (No change.)

§28.15. Portable Building Unit Permits.

(a) - (c) (No change.)

(d) Payment of permit fee. The cost of the permit is $15 [~~$7.50~~], with all fees payable in accordance with §28.11(f) of this title (relating to General Oversize/Overweight Permit Requirements and Procedures). All fees are non-refundable.

(e) - (f) (No change.)

§28.16. Permits for Military and Governmental Agencies.

(a) The movement of an overdimension [~~over dimension~~] load on vehicles registered to the military or governmental agencies must obtain a [~~routing~~] permit from the MCD. [~~, and there will not be a charge for the routing.~~] Military or government applicants may apply for any applicable permit type issued by the department and shall follow all permit restrictions and requirements for the permit issued.

(b) (No change.)

(c) The size and weight measurements of the overdimension [~~over dimension~~] load must not exceed the permit size and weight limits stated in §28.11(d) of this subchapter [~~title~~] (relating to Maximum permit weight limits [~~Permit Issuance Requirements and Procedures~~]), and §28.12(b) [~~§28.12(f)~~] of this subchapter [~~title~~] (relating to Overweight loads [~~Single-Trip Permits Issued under Transportation Code, Chapter 623, Subchapter D~~]), unless specific permission is granted by the MCD upon request of an authorized representative of the military or a governmental agency.

(d) (No change.)

(e) The movement of an overdimension [~~over dimension~~] military or governmental load transported on vehicles not licensed with federal or state exempt license plates must obtain a permit, and must comply with §28.11 of this title (relating to Permit Issuance Requirements and Procedures), and §28.12 of this title (relating to Single-Trip Permits Issued under Transportation Code, Chapter 623, Subchapter D).

(f) A military or government entity is not required to pay the fee for a permit issued under this chapter if the load is transported only on vehicles that display federal or state exempt license plates.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800559
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Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 463-8683

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SUBCHAPTER C. PERMITS FOR OVER AXLE AND OVER GROSS WEIGHT TOLERANCES

43 TAC §28.30

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §623.076(c), which authorizes the commission to establish the fee for certain oversize or overweight permits.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 621, 622, 623, and 643.

§28.30. Permits for Over Axle and Over Gross Weight Tolerances.

(a) - (d) (No change.)

(e) Application for permit.

(1) - (2) (No change.)

(3) The application shall be accompanied by:

(A) a base fee of $75 and an administration fee of $5.00;

(B) an original bond or letter of credit as required in subsection (d) of this section, unless previously filed by the applicant; and

(C) an additional fee based on the following schedule: Figure: 43 TAC §28.30(e)(3)(C)

(4) (No change.)

(f) - (m) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800560
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 463-8683

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SUBCHAPTER E. PERMITS FOR OVERSIZE AND OVERWEIGHT UNLADEN LIFT EQUIPMENT MOTOR VEHICLES

43 TAC §28.64

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §623.076(c), which authorizes the commission to establish the fee for certain oversize or overweight permits.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 621, 622, 623, and 643.

§28.64. Annual Permits.

(a) General information. Permits issued under this section are subject to the requirements of §28.61 of this title (relating to General Requirements for Permits for Oversize and Overweight Unladen Lift Equipment Motor Vehicles).

(1) - (4) (No change.)

(5) The fee for an annual permit issued under this section is $100 [~~$50~~].

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800561
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 463-8683

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SUBCHAPTER G. PORT OF BROWNSVILLE PORT AUTHORITY PERMITS

43 TAC §28.91, §28.92

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department and, more specifically, Transportation Code, §623.076(c), which authorizes the commission to establish the fee for certain oversize or overweight permits.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 621, 622, 623, and 643.

§28.91. Responsibilities.

(a) Surety bond. The department may require the Port of Brownsville to [~~shall~~] post a surety bond in the amount of $500,000 for the purpose of reimbursing the department for actual maintenance

costs of State Highway 48/State Highway 4 and U.S. Highway 77/U.S. Highway 83 in the event that sufficient revenue is not collected from permits issued under this subchapter.

(b) Verification of permits. All permits issued by the Port of Brownsville shall be carried in the permitted vehicle. The Port of Brownsville shall provide access [~~or a phone number~~] for verification of permit authenticity by law enforcement and [~~or~~] department personnel.

(c) - (d) (No change.)

(e) Audits. The department may conduct audits annually [~~semi-annually~~] or upon direction by the executive director of all Port of Brownsville permit issuance activities. In order to insure compliance, audits will at a minimum include a review of all permits issued, financial transaction records related to permit issuance, review of vehicle scale weight tickets and monitoring of personnel issuing permits under this subchapter.

(f) Revocation of authority to issue permits. If the department determines as a result of an audit that the Port of Brownsville is not complying with this subchapter, the executive director will issue a notice to the Port of Brownsville allowing 30 days to correct any non-compliance issue. If after 30 days it is determined that the Port of Brownsville is not in compliance, then the executive director may revoke the Port of Brownsville's authority to issue permits.

(1) - (2) (No change.)

(3) Upon revocation of authority to issue permits, termination of the maintenance contract, or expiration of this subchapter, all permit fees collected by the port, less allowable administrative costs [~~with the exception of administrative costs already expended~~], shall be paid to the department.

(g) Fees. Fees collected under this subchapter shall be used solely to provide funds for the payments provided for under Transportation Code, §623.213, less administrative costs.

(1) The permit fee shall not exceed $80 per trip. The Port of Brownsville may retain up to 15% of such permit fees for administrative costs, and the balance of the permit fees shall be deposited in the state highway fund to be used [~~to make payments to the department~~] for maintenance of State Highway 48/State Highway 4 and U.S. Highway 77/U.S. Highway 83.

(2) The Port of Brownsville may issue a permit and collect a fee for a permit issued under this subchapter for any vehicle or vehicle combination [~~any load~~] exceeding vehicle size or weight as specified by Transportation Code, Chapter 621, Subchapters B and C, originating at:

(A) the Gateway International Bridge traveling only on State Highway 48/State Highway 4 to the Port of Brownsville; [~~or originating at~~]

(B) the Port of Brownsville traveling on State Highway 48/State Highway 4 to the Gateway International Bridge;[~~.~~]

[~~(3) The Port of Brownsville may also issue a permit and collect a fee for any load exceeding vehicle size or weight as specified by Transportation Code, Chapter 621, Subchapters B and C, originating at~~]

(C) the Veterans International Bridge at Los Tomates, traveling on U.S. Highway 77/U.S. Highway 83 and State Highway 48/State Highway 4 to the entrance to Port of Brownsville; or

(D) [~~originating at~~] the Port of Brownsville, traveling on State Highway 48/State Highway 4 and U.S. Highway 77/U.S. Highway 83 to the Veterans International Bridge at Los Tomates.

(h) Maintenance Contract. The Port of Brownsville shall enter into a maintenance contract with the department for the maintenance of State Highway 48/State Highway 4 between the Gateway International Bridge and the Port of Brownsville and the maintenance of U.S. Highway 77/U.S. Highway 83 and State Highway 48/State Highway 4 between the Veterans International Bridge at Los Tomates and the Port of Brownsville.

(1) [~~The maintenance contract shall provide for a system of payments from the Port of Brownsville to the department for all maintenance costs expended by the department to maintain State Highway 48/State Highway 4 and U.S. Highway 77/U.S. Highway 83 to the current level of service or pavement conditions.~~] Maintenance shall include, but is not limited to, routine maintenance, preventive maintenance, and total reconstruction of the roadway and bridge structures as determined by the department to maintain the current level of service.

(2) The Port of Brownsville may make direct restitution to the department for actual maintenance costs [~~from this fund~~] in lieu of the department filing against the surety bond described in subsection (a) of this section, in the event that sufficient revenue is not collected.

(i) Reporting. Brownsville Port Authority shall provide monthly and annual reports to the department's Finance Division regarding all permits issued and all fees collected during the period covered by the report. The report must be in a format approved by the department.

§28.92. Permit Issuance Requirements and Procedures.

(a) Permit application. Application for a permit issued under this subchapter shall be in a form approved by the department, and shall at a minimum include:

(1) - (8) (No change.)

[~~(9) the name of the driver of the vehicle in which the cargo is to be transported;~~]

(9) [~~(10)~~] the location where the cargo was loaded; and

(10) the date or dates on which movement authorized by the permit is allowed.

[~~(11) the name of the specific Port of Brownsville employee issuing the permit.~~]

(b) Permit issuance.

(1) - (2) (No change.)

[~~(3) Reporting. Brownsville Port Authority shall provide monthly and annual reports to the department's Finance Division regarding all permits issued and all fees collected. The report must be in a format approved by the department.~~]

(c) - (g) (No change.)

(h) Restrictions.

(1) - (2) (No change.)

[~~(3) A copy of the certified weight ticket shall be retained by the Port of Brownsville and become a part of the official permit record subject to inspection by department personnel or Texas Department of Public Safety personnel.~~]

(3) [~~(4)~~] The owner of a vehicle permitted under this subchapter must be registered as a motor carrier in accordance with Transportation Code, Chapters 643 or 645, prior to the oversize or over-

weight permit being issued. The Port of Brownsville shall maintain records relative to this subchapter, which are subject to audit by department personnel.

(4) [~~(5)~~] Permits issued by the Port of Brownsville shall be in a form prescribed by the department.

(5) [~~(6)~~] The maximum speed for a permitted vehicle shall be 55 miles per hour or the posted maximum, whichever is less.

~~[(7) This subchapter expires June 1, 2009.]~~

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800562
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 463-8683

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SUBCHAPTER H. CHAMBERS COUNTY PERMITS

43 TAC §28.101, §28.102

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department and, more specifically, Transportation Code, §623.076(c), which authorizes the commission to establish the fee for certain oversize or overweight permits.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 621, 622, 623, and 643.

§28.101. Responsibilities.

(a) Surety bond. The department may require Chambers County to [~~shall~~] post a surety bond in the amount of $500,000 for the purpose of reimbursing the department for actual maintenance costs of Farm-to-Market Road 1405 and the frontage road of State Highway 99 located in the Cedar Crossing Business Park in the event that sufficient revenue is not collected from permits issued under this subchapter.

(b) Verification of permits. All permits issued by Chambers County shall be carried in the permitted vehicle. Chambers County shall provide access [~~or a phone number~~] for verification of permit authenticity by law enforcement and [~~or~~] department personnel.

(c) - (d) (No change.)

(e) Audits. The department may conduct annual audits of all [~~permits issued by~~] Chambers County permit activities [~~semi-annually~~] or upon direction by the executive director [~~under this subchapter~~]. In order to insure compliance, audits will at a minimum include a review of all permits issued, financial transaction records related to permit issuance, review of vehicle scale weight tickets and monitoring of personnel issuing permits under this subchapter.

(f) (No change.)

(g) Permit fees. Permit fees collected under this subchapter shall be used solely to provide funds for the payments provided for under Transportation Code, §623.253, less administrative costs.

(1) (No change.)

(2) Chambers County may issue a permit and collect a fee for a permit issued under this subchapter for any vehicle or vehicle combination exceeding vehicle size or weight as specified by Transportation Code, Chapter 621, Subchapters B and C [~~weighing up to 100,000 pounds, and with load dimensions not exceeding 12' wide, 16' high or 110' long,~~] traveling only on Farm-to-Market Road 1405 and the frontage road of State Highway 99 located in the Cedar Crossing Business Park.

(h) Maintenance contract. Chambers County shall enter into a maintenance contract with the department for the maintenance of Farm-to-Market Road 1405 and the frontage road of State Highway 99 located in the Cedar Crossing Business Park.

~~[(1) The maintenance contract shall provide for a system of payments of all permit fees, less allowable administrative costs, from Chambers County to the state highway fund to maintain Farm-to-Market Road 1405 and the frontage road of State Highway 99 located in the Cedar Crossing Business Park to the current level of service or pavement conditions.]~~

(1) [~~(2)~~] Maintenance shall include, but is not limited to, routine maintenance, preventive maintenance, and total reconstruction of the roadway and bridge structures as determined by the department to maintain the current level of service.

(2) Chambers County may make direct restitution to the department for actual maintenance costs in lieu of the department filing against the surety bond described in subsection (a) of this section, in the event that sufficient revenue is not collected.

(i) (No change.)

§28.102. Permit Issuance Requirements and Procedures.

(a) Permit application. Application for a permit issued under this subchapter shall be in a form approved by the department, and shall at a minimum include:

(1) - (5) (No change.)

(6) the kind and weight of each commodity to be transported, not to exceed loaded dimensions of 12' wide, 16' high, or 110' long, or 100,000 pounds gross weight;

(7) - (9) (No change.)

(10) the date or dates [~~date(s)~~] on which movement authorized by the permit is allowed.

(b) (No change.)

(c) Maximum permit weight limits.

(1) An axle group must have a minimum spacing of four feet, measured [~~measuring~~] from center of axle to center of axle, between each axle in the group, to achieve the maximum permit weight for the group.

(2) - (4) (No change.)

(d) - (i) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800563
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 463-8683

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SUBCHAPTER I. COMPLIANCE

43 TAC §§28.110 - 28.116

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department and, more specifically, Transportation Code, §623.076(c), which authorizes the commission to establish the fee for certain oversize or overweight permits.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 621, 622, 623, and 643.

§28.110. Purpose.

The purpose of this subchapter is to provide for an efficient and effective system of enforcement of Transportation Code, Chapters 621, 622, and 623 by setting out procedures for citing violations related to the operation, with or without oversize or overweight permits, of vehicles or combination of vehicles on a public road or highway in the state in excess of the applicable maximum weight, height, length, or width.

§28.111. Applicability.

(a) A person operating a vehicle for which a permit under this chapter is required shall comply with all applicable terms, conditions, and requirements of the permit, and with this chapter and Transportation Code, Chapters 621, 622, or 623 as applicable.

(b) A person operating on a public road or highway a vehicle for which a permit under this chapter is not required shall comply with the weight and size provisions of Transportation Code, Chapters 621, 622, or 623.

(c) Gross weight registration. A person may not operate on a highway or public road a vehicle that exceeds its gross weight registration.

§28.112. Falsification of Information on Application and Permit.

(a) A person who provides false information on the permit application or another form required by the department for the issuance of an oversize or overweight permit commits a violation of this chapter and is subject to revocation of an oversize or overweight permit and the enforcement provisions of Subchapter K of this chapter.

(b) A person violates this chapter if the person produces a counterfeit permit or alters a permit issued by the department.

§28.113. Shipper Certificate of Weight.

(a) For a shipper's certificate of weight to be valid, the shipper must:

(1) certify that the information contained on the form used for the shipper's certificate of weight is accurate; and

(2) deliver the certificate to the motor carrier or other person transporting the shipment before the motor carrier or other person applies for an overweight permit under this chapter.

(b) It is an affirmative defense to administrative enforcement under this chapter that the holder of the permit relied on a valid shipper's certificate of weight.

§28.114. Compliance with Remote Permit System.

A person who by contract is authorized by the department to access the electronic filing applications system shall comply with all of the requirements of the contract and any conditions placed on the permits.

§28.115. Permits Issued by Another State.

A permit issued by another state under an authorized reciprocal agreement is subject to this chapter and Transportation Code, Chapters 621, 622, or 623 as applicable, as if the permit were issued by the department.

§28.116. Permit Compliance.

A permit issued under this chapter becomes invalid immediately on the violation of a rule or a condition or requirement placed on the permit. Movement over a highway or public road of the vehicle for which the permit was issued after the permit becomes invalid under this section is a violation of this chapter and subject to enforcement action under this chapter and Transportation Code, Chapters 621, 622, or 623.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800564
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 463-8683

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SUBCHAPTER J. RECORDS AND INSPECTIONS

43 TAC §§28.200 - 28.202

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department and, more specifically, Transportation Code, §623.076(c), which authorizes the commission to establish the fee for certain oversize or overweight permits.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 621, 622, 623, and 643.

§28.200. Purpose.

The purpose of this subchapter is to advise persons who are subject to Transportation Code, Chapters 621, 622, or 623 of the information and records that they are required to maintain, where and how long the records must be maintained, and department procedures for examining and inspecting these records.

§28.201. Investigations and Inspections of Records.

(a) Inspections.

(1) A person shall give an inspector access to the person's premises to conduct inspections or investigations of an alleged violation of this chapter or Transportation Code, Chapters 621, 622, or 623. The person shall provide adequate workspace with reasonable working conditions and shall allow the inspector to copy and verify records and documents.

(2) The inspector will conduct inspections and investigations during normal business hours unless mutual arrangements have been made otherwise.

(3) The inspector will present to the person the inspector's credentials and a written statement from the department indicating the inspector's authority to conduct the investigation.

(b) Access. A person shall provide access to requested records and documents at:

(1) the person's principal place of business; or

(2) a location agreed to by the department and the person.

(c) If a time and location cannot be agreed upon, the department shall designate the time and location by certified mail or facsimile.

§28.202. Records.

(a) General records to be maintained. Each person who is subject to this chapter shall maintain at its principal place of business in this state:

(1) operational logs, insurance certificates, and documents to verify the person's operations;

(2) complete and accurate records of services performed;

(3) all certificate of title documents, shipper's certificate of weight, including information used to support the shipper's certificate of weight, weight tickets, permits for oversize or overweight vehicles and loads, dispatch records, load tickets, waybill or any other document that verify the operations of the vehicle to determine the actual weight, insurance coverage, size or capacity of the vehicle, and the size or weight of the commodity being transported.

(b) Location of files. Each person who is subject to this chapter shall maintain at the principal place of business all records and information required by the department.

(c) Copies of permits. A copy of the oversize or overweight permit shall be maintained in the vehicle for which the permit was issued during the period that the permit is required. On demand by a department inspector or any other authorized government personnel, the driver of the vehicle shall present the permit to that person.

(d) Preservation and destruction of records. Information required under this section shall be maintained for not less than two years at the person's principal business address.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800565

Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 463-8683

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SUBCHAPTER K. ENFORCEMENT

43 TAC §§28.300 - 28.306

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department and, more specifically, Transportation Code, §623.076(c), which authorizes the commission to establish the fee for certain oversize or overweight permits.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 621, 622, 623, and 643.

§28.300. Purpose.

The purpose of this subchapter is to provide for an efficient and effective system of enforcement of Transportation Code, Chapters 621, 622, and 623 and the rules adopted under those chapters by setting out procedures for administrative penalties, revocation, and denial of oversize or overweight permits.

§28.301. Administrative Penalties.

(a) Authority. The department may impose an administrative penalty against a person who:

(1) provides false information on a permit application or another form provided to the department concerning the issuance of an oversize or overweight permit;

(2) violates this chapter or Transportation Code, Chapters 621, 622, or 623;

(3) violates an order adopted under this chapter or Transportation Code, Chapters 621, 622, or 623; or

(4) fails to obtain an oversize or overweight permit that is required under this chapter or Transportation Code, Chapters 621, 622, or 623.

(b) Amount of penalty.

(1) Except as provided by this section, the amount of the penalty may not exceed $5,000 for each violation.

(2) If it is found that the person knowingly committed a violation, the penalty for that violation may be in an amount not to exceed $15,000. A person acts knowingly if the person acts with knowledge that the act constitutes or violates Transportation Code, Chapters 621, 622, or 623, this chapter, or an order adopted under this chapter.

(3) If it is found that the person knowingly committed multiple violations, the aggregate penalty for the multiple violations may be in an amount not to exceed $30,000. Multiple violations are all violations arising during a single episode under one scheme or course of conduct.

(4) Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty under this section.

(5) Amount of penalty. Any recommendation that a penalty should be imposed must be based on the following factors:

(A) the seriousness of the violation, including the nature, circumstances, extent, and gravity of any prohibited acts, and the hazard or potential hazard created to the health, safety, or economic welfare of the public;

(B) the economic harm to property or the environment caused by the violation;

(C) the history of previous violations;

(D) the amount necessary to deter future violations;

(E) efforts made to correct the violation; and

(F) any other matters that justice may require.

§28.302. Administrative Sanctions.

(a) The department may revoke, suspend, or deny an oversize or overweight permit if the person or permit holder:

(1) provides false information on the permit application or another form provided to the department concerning the issuance of an oversize or overweight permit;

(2) violates this chapter or Transportation Code, Chapters 621, 622, or 623;

(3) violates an order adopted under this chapter or Transportation Code, Chapters 621, 622, or 623; or

(4) fails to obtain an oversize or overweight permit that is required under this chapter or Transportation Code, Chapters 621, 622, or 623.

(b) The department may probate a suspension ordered under this section.

(1) In determining whether to probate a suspension, the department will review:

(A) the seriousness of the violation;

(B) prior violations by the person;

(C) whether the department has previously probated a suspension for the person;

(D) cooperation by the person in the investigation and enforcement proceeding; and

(E) the ability of the person to correct the violations.

(2) The department shall set the length of the probation based on the seriousness of the violation and previous violations by the person.

(3) The department will require that the person whose suspension is probated report monthly to the department any information necessary to determine compliance with the terms of the probation.

(4) The department may revoke the probation and impose a deferred administrative penalty if the person fails to abide by any terms of the probation.

§28.303. Implications for Nonpayment of Penalties; Grounds for Action.

The department may not issue an oversize or overweight permit to the person who has not paid an administrative penalty that is due or for the vehicle that is the subject of the enforcement order until the amount of the delinquent administrative penalty has been paid to the department.

§28.304. Administrative Proceedings.

(a) If the department decides to take an enforcement action under §28.301 or §28.302 of this subchapter, the department shall give written notice to the person against whom the action is being taken by first class mail to the person's address as shown in the records of the department.

(b) The notice required by subsection (a) of this section must include:

(1) a brief summary of the alleged violation;

(2) a statement of each enforcement action being taken;

(3) the effective date of each enforcement action;

(4) a statement informing the person of the person's right to request a hearing;

(5) a statement describing the procedure for requesting a hearing, including the period during which a hearing request must be made; and

(6) a statement that the proposed penalties and sanctions will take effect on the date specified in the letter if the person fails to request a hearing.

(c) The person must submit a written request for a hearing to the address provided in the notice not later than the 26th day after the date the notice required by subsection (a) of this section is mailed.

(d) On receipt of the written request for a hearing, the department will refer the matter to the State Office of Administrative Hearings. When the hearing is set, the department will give notice of the time and place of the hearing to the person.

(e) If the person does not make a written request for a hearing or enter into a settlement agreement under §28.305 of this subchapter before the 27th day after the date that the notice is mailed, the department's decision becomes final and unappealable on that date.

§28.305. Settlement Agreements.

(a) The department and the alleged violator may enter into a compromise settlement agreement at any time before the issuance of a final decision. The compromise settlement agreement must provide that the alleged violator consents to the assessment of a specified administrative penalty or to the imposition of the specified administrative sanction by the department against the alleged violator and must be signed by the alleged violator and the director. A compromise agreement is not an admission of the alleged violation.

(b) If the settlement agreement requires the payment of a penalty to the department, the alleged violator must submit a cashier's check or money order to the department in the agreed amount before the agreement may be executed.

(c) The settlement agreement must include a clause that authorizes the department to revoke the settlement agreement and initiate a hearing on the alleged violations if the alleged violator fails to abide by the terms of the settlement agreement.

(d) Upon the execution by the director of a settlement agreement, the administrative proceeding ends. The settlement agreement is a department order that is final and unappealable.

§28.306. Administrative Penalty for False Information on Certificate by a Shipper.

(a) The department may investigate and impose an administrative penalty on a shipper who provides false information on a shipper's certificate of weight that the shipper delivers to a person transporting a shipment.

(b) The notice and hearing requirements of §28.304 of this subchapter apply to the imposition of an administrative penalty under this section.

(c) The amount of an administrative penalty imposed under this section is calculated in the same manner as the amount of an administrative penalty imposed under §28.301 of this subchapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800566
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: March 16, 2008
For further information, please call: (512) 463-8683

WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 1. ADMINISTRATION

PART 1. OFFICE OF THE GOVERNOR

CHAPTER 5. BUDGET AND PLANNING OFFICE

SUBCHAPTER A. FEDERAL AND INTERGOVERNMENTAL COORDINATION

DIVISION 3. STATE PLANNING ASSISTANCE GRANTS

1 TAC §§5.83, 5.85, 5.87

The Office of the Governor withdraws the proposed amendments to §§5.83, 5.85, and 5.87 which appeared in the August 24, 2007, issue of the *Texas Register* (32 TexReg 5249).

Filed with the Office of the Secretary of State on January 28, 2008.

TRD-200800466
David Zimmerman
Assistant General Counsel
Office of the Governor
Effective date: January 28, 2008
For further information, please call: (512) 936-0181

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 21. STUDENT SERVICES

SUBCHAPTER X. DETERMINATION OF RESIDENT STATUS AND WAIVER PROGRAMS FOR CERTAIN NONRESIDENT PERSONS

19 TAC §21.730

The Texas Higher Education Coordinating Board withdraws the proposed amendments to §21.730 which appeared in the August 24, 2007, issue of the *Texas Register* (32 TexReg 5285).

Filed with the Office of the Secretary of State on January 29, 2008.

TRD-200800498
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: January 29, 2008
For further information, please call: (512) 427-6114

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 7. BANKING AND SECURITIES

PART 7. STATE SECURITIES BOARD

CHAPTER 107. TERMINOLOGY

7 TAC §107.2

The Texas State Securities Board adopts an amendment to §107.2, concerning definitions, without changes to the proposed text as published in the November 2, 2007, issue of the *Texas Register* (32 TexReg 7813).

The amendment updates definitions to reference the Financial Industry Regulatory Authority (FINRA), which was created from the merger of NASD and the member regulation, enforcement, and arbitration functions of the New York Stock Exchange.

The rule accurately references a new industry regulatory organization.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The adopted amendment affects Texas Civil Statutes, Articles 581-12, 581-12-1, 581-13, 581-18, and 581-19.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800656
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Effective date: February 21, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 305-8303

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CHAPTER 115. SECURITIES DEALERS AND AGENTS

7 TAC §§115.1 - 115.5

The Texas State Securities Board adopts amendments to §§115.1 - 115.5, concerning securities dealers and agents, without changes to the proposed text as published in the November 2, 2007, issue of the *Texas Register* (32 TexReg 7814).

The amendments update references to reflect the creation of FINRA (Financial Industry Regulatory Authority) from the merger of the National Association of Securities Dealers and the member regulation, enforcement, and arbitration functions of the New York Stock Exchange.

The rules accurately reference an industry regulatory organization.

No comments were received regarding adoption of the amendments.

The amendments are adopted under Texas Civil Statutes, Article 581-28-1, and 581-13.D. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes. Article 13.D provides the Board with authority to waive examination requirements for any applicant or class of applicants.

The adopted amendments affect Texas Civil Statutes, Articles 581-12, 581-13, 581-18, and 581-19.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800657
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Effective date: February 21, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 305-8303

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CHAPTER 116. INVESTMENT ADVISORS AND INVESTMENT ADVISER REPRESENTATIVES

7 TAC §116.2, §116.3

The Texas State Securities Board adopts amendments to §116.2 and §116.3, concerning investment advisers and investment adviser representatives, without changes to the proposed text as published in the November 2, 2007, issue of the *Texas Register* (32 TexReg 7815).

The amendments update references to reflect the creation of FINRA (Financial Industry Regulatory Authority) from the merger of NASD and the member regulation, enforcement, and arbitration functions of the New York Stock Exchange.

The rules accurately reference a new industry regulatory organization.

No comments were received regarding adoption of the amendments.

The amendments are adopted under Texas Civil Statutes, Articles 581-28-1 and 581-12-1.B. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes. Section 12-1.B provides the Board with authority to make rules authorizing a federal covered investment adviser or a representative of a federal covered investment adviser to engage in rendering services as an investment adviser in this state on submission to and receipt by the Commissioner of a notice filing, a consent to service of process, and fee.

The adopted amendments affect Texas Civil Statutes, Article 581-12, 581-12-1, 581-13, 581-18, and 581-19.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800658
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Effective date: February 21, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 305-8303

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CHAPTER 133. FORMS

7 TAC §133.1

The Texas State Securities Board adopts the repeal of §133.1, a form concerning a Texas open records request, without changes to the proposal as published in the December 7, 2007, issue of the *Texas Register* (32 TexReg 8991).

The repeal of this form allows for the simultaneous adoption of a new form.

The repeal eliminates an outdated form.

No comments were received regarding adoption of the repeal.

The repeal is adopted under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The adopted repeal affects Texas Government Code, Title 5, Chapter 552.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800659
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Effective date: February 21, 2008
Proposal publication date: December 7, 2007
For further information, please call: (512) 305-8303

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7 TAC §133.1

The Texas State Securities Board adopts new §133.1, a form concerning a request for public information, without changes to the proposed text as published in the December 7, 2007, issue of the *Texas Register* (32 TexReg 8991).

The adopted new form updates references to "public information" (instead of "open records") and to the Office of the Attorney General as the agency having authority over the regulations for copy charges. Information on the previous form that is no longer needed has been omitted from the new form, and various non-substantive and cosmetic changes have been made.

The adopted new form reflects accurate references and includes only information that is needed.

No comments were received regarding adoption of the new rule.

The rule is adopted under Texas Civil Statutes, Article 581- 28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The adopted rule affects Texas Government Code, Title 5, Chapter 552.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800660

Denise Voigt Crawford
Securities Commissioner
State Securities Board
Effective date: February 21, 2008
Proposal publication date: December 7, 2007
For further information, please call: (512) 305-8303

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7 TAC §133.7

The Texas State Securities Board adopts the repeal of §133.7, a form concerning an application for registration of securities, without changes to the proposal as published in the December 7, 2007, issue of the *Texas Register* (32 TexReg 8992).

The repeal of this form allows for the simultaneous adoption of a new form.

The repeal eliminates an outdated form.

No comments were received regarding adoption of the repeal.

The repeal is adopted under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The adopted repeal affects Texas Civil Statutes, Articles 581-7 and 581-35.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800661
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Effective date: February 21, 2008
Proposal publication date: December 7, 2007
For further information, please call: (512) 305-8303

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7 TAC §133.7

The Texas State Securities Board adopts new §133.7, a form concerning an application for registration of securities, without changes to the proposed text as published in the December 7, 2007, issue of the *Texas Register* (32 TexReg 8992).

The adopted new form replaces an outdated form to eliminate the requirement that a corporate applicant provide a certification regarding Texas franchise taxes. The certification is no longer required under the Texas Business Corporation Act. The new form also incorporates various nonsubstantive and cosmetic changes.

The securities registration process is streamlined by eliminating an unnecessary certification.

No comments were received regarding adoption of the new form.

The rule is adopted under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The adopted rule affects Texas Civil Statutes, Article 581-7 and 581-35.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800662
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Effective date: February 21, 2008
Proposal publication date: December 7, 2007
For further information, please call: (512) 305-8303

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 22. PROCEDURAL RULES

The Public Utility Commission of Texas (commission) adopts the repeal of §22.183 and adopts new §22.183, relating to Failure to Attend Hearing and Disposition by Default with no changes to the proposed text as published in the November 16, 2007, issue of the *Texas Register* (32 TexReg 8241). The new rule will remove the restrictions on the types of proceedings that may proceed on a default basis and clarify the procedures that will be used to process proceedings if a party fails to appear for hearing, including more specific criteria for what types of notice must be provided to defaulting parties. Current §22.183, which is being repealed herein, allows disposition by default for proceedings initiated by the commission staff where allegations are made in a Notice of Violation, but the rule does not apply to the assessment of administrative penalties. Because the State Office of Administrative Hearings (SOAH) has adopted the commission's procedural rules, current §22.183 has had the effect of prohibiting the processing of Notices of Violation that seek administrative penalties when the party fails to appear for hearing, even though more severe actions such as license revocation are permitted. The new rule will remove the current restriction that prohibits default orders from assessing administrative penalties and would permit the assessment of penalties through a default order if a party fails to appear, consistent with the manner in which other regulatory agencies address such matters. The new rule is also intended to generally conform to the procedures used by the SOAH for other state agencies and provides clarity as to the forms of notice that must be given to an affected party prior to the issuance of a default order. The repeal of §22.183 and new §22.183 are adopted under Project Number 33864.

A public hearing was not requested, and the commission received no comments on the proposed repeal of §22.183 and adoption of new §22.183.

SUBCHAPTER J. SUMMARY PROCEEDINGS

16 TAC §22.183

This repeal is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 2007 and Supp. 2007) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure; and PURA, §15.024, which provides the commission with the authority to assess a penalty against a person who fails to timely respond to a written notice summarizing an alleged violation and a corresponding recommended penalty.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 14.052, and 15.024.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 31, 2008.

TRD-200800552
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: February 20, 2008
Proposal publication date: November 16, 2007
For further information, please call: (512) 936-7223

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16 TAC §22.183

This new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated, §14.002 and §14.052 (Vernon 2007 and Supp. 2007) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure; and PURA, §15.024, which provides the commission with the authority to assess a penalty against a person who fails to timely respond to a written notice summarizing an alleged violation and a corresponding recommended penalty.

Cross Reference to Statutes: Public Utility Regulatory Act, §§14.002, 14.052, and 15.024.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 31, 2008.

TRD-200800553
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: February 20, 2008
Proposal publication date: November 16, 2007
For further information, please call: (512) 936-7223

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PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 31. ADMINISTRATION

16 TAC §31.4

The Texas Alcoholic Beverage Commission (commission) adopts amendments to §31.4, relating to the placement of public information signs on the premises of alcoholic beverage license and permit holders with changes to the proposed text as published in the November 16, 2007, issue of the *Texas Register* (32 TexReg 8243).

Senate Bill 904, §16, 80th Legislature, Regular Session, 2007, amended Chapter 11 of the Texas Alcoholic Beverage Code (Code) to add new §11.042 and §61.111 to the Code. These new sections provide that a holder of an on-premises license or permit shall display a warning sign on the door to each restroom on the premises informing the public of the risks of drinking alcohol during pregnancy. The sections also provide that the commission shall specify the language, size, and design of the required sign. The rule, as amended, is adopted to implement these sections.

The commission has received numerous comments on the proposed rule during the comment period. The commenters were individuals, the Texas Restaurant Association, the University of Texas Health Science Center at San Antonio, The March of Dimes, the Department of State Health Services, Community Mental Health & Substance Abuse, Office of Title V & Family Health, Texas Health and Human Resources Commission, Texas Office of Prevention of Developmental Disabilities, Greater Dallas Council on Alcohol and Drug Abuse, Rainbow Days, Inc., and State Representatives Jim Jackson and Vicki Truitt. The commenters were generally in favor of the rules; however, they suggested changes to the size, language and locations of the proposed sign. Changes to the rule text were made as indicated in the Responses to Comments. Additionally, reformatting was required to separate the types of public information signs.

Comment: Concerning the size of the sign all of those who commented felt that the size of the sign was not adequate. Most commentors agreed that the sign should be at least letter size, or 8 1/2 x 11 inches.

Response: The commission agrees and has changed the rule text to reflect the comments. The rule has also been reformatted to accommodate this change.

Comment: Concerning the specific language that is included on the sign most commentors believed that the language should be simple and direct, but also provide more information about the types of birth defects that can result from consuming alcohol during pregnancy. Many of the commentors referred the commission to language developed by the Surgeon General, the Center for Disease Control, the National Institute of Alcohol Abuse and Alcoholism, and the National Organization of Fetal Alcohol Syndrome. Many of the commentors suggested specific language developed for consumers by these organizations.

Response: The commission agrees with the comments and the rule text and formatting were changed as a result of these comments. The amended text reflects language developed for the

public by the nationally recognized health organizations suggested by the commentors.

Comment: Concerning the location of the sign, several commentors felt that the commission should specify that the signs be placed in both the men's and the women's restrooms, because fathers should also be aware of the risks of consuming alcohol during pregnancy.

Response: Although the commission agrees with the commentors, no change was made to the rule text as a result of this comment. The proposed rule specified that the sign was to be displayed at the exit to all public restrooms, which includes men's, women's and restrooms accessible to both sexes.

Comment: Also concerning the location of the sign, some commentors suggested that the rule should specify that the sign be placed "at eye level" to ensure it would be seen by patrons as they exit the restroom.

Response: The commission agrees with the commentors. However "eye level" is a term that can vary based on the height of an individual. The rule text has been amended as a result of the comment to reflect that the sign will be placed so as to be "easily seen".

The amended rule is adopted under the authority of §5.31 of the Alcoholic Beverage Code (Code), which authorizes the commission to adopt rules necessary to carry out provisions of the Code and §11.042 and §61.111 of the Code, which provide specific authority for the commission to adopt a rule to implement the section.

Cross Reference: Sections 5.31, 11.042, and 61.111 of the Alcoholic Beverage Code are affected by the amendment.

§31.4. Public Information Signs.

(a) Any licensed business location in the state which sells or serves alcoholic beverages to the ultimate consumer shall display at his place of business in a prominent place easily seen by the public, i.e. near the door or by the cash register, a sign that provides the following information: "If you have a complaint about the sale or service of alcoholic beverages in this establishment, please contact the Texas Alcoholic Beverage Commission, P. O. Box 13127, Austin, Texas 78711-3127, or phone (512) 206-3333."

(1) This sign shall be no smaller than 6 inches by 3-1/2 inches and shall be in lettering or type of a size sufficient to render it both conspicuous and readily legible.

(2) The sign shall be made of sturdy material; if made of paper, the weight shall be no less than 65# stock.

(b) Health Risk Warning Sign. A holder of a license or permit authorizing the sale of alcoholic beverages for on premises consumption shall display a health risks warning sign. The health risks warning sign must:

(1) be posted at each egress of all public restrooms on the licensed premises;

(2) be placed at a level where the sign can be easily seen by persons exiting the restroom;

(3) be not less than 8 1/2 x 11 inches in size;

(4) the following language shall be printed in English and in Spanish, in bold black type on a white surface, or other clearly legible graphic design, with a font or type set size of not less than 28 point Arial or Helvetica:

Figure: 16 TAC §31.4(b)(4)

(c) The responsibility of furnishing the required signs in this section is the sole responsibility of the licensee or permittee.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 30, 2008.

TRD-200800547
Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Effective date: February 19, 2008
Proposal publication date: November 16, 2007
For further information, please call: (512) 206-3204

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CHAPTER 33. LICENSING
SUBCHAPTER C. LICENSE AND PERMIT ACTION

16 TAC §33.33

The Texas Alcoholic Beverage Commission (commission) adopts new §33.33, requiring permit and license holders to maintain a current and valid address on file with the commission without changes to the proposed text as published in the November 16, 2007, issue of the *Texas Register* (32 TexReg 8244). The adopted new section will not be republished.

The commission did not receive comments in response to the published proposed rule.

The new rule is adopted under the authority of §5.31 of the Alcoholic Beverage Code, which gives the commission authority to prescribe and publish rules necessary to carry out the provisions of the Texas Alcoholic Beverage Code.

Cross Reference: Section 5.31 of the Alcoholic Beverage Code is affected by the adopted rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 31, 2008.

TRD-200800550
Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Effective date: February 20, 2008
Proposal publication date: November 16, 2007
For further information, please call: (512) 206-3204

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CHAPTER 41. AUDITING
SUBCHAPTER C. RECORDS AND REPORTS BY LICENSEES AND PERMITTEES

16 TAC §41.56

The Texas Alcoholic Beverage Commission (commission) adopts amendments to §41.56, concerning out-of-state winery direct shipper's permits, without changes to the proposed text as published in the November 16, 2007, issue of the *Texas Register* (32 TexReg 8246). The adopted rule amendment will not be republished.

The commission received no comments regarding the proposed rule during the comment period.

The adoption of the amended rule is authorized by §5.31 of the Alcoholic Beverage Code (Code) which gives the commission authority to prescribe and publish rules necessary to carry out the provisions of the Code and §54.06 of the Code which provides the commission with authority to establish rules for periodic reports by out-of-state winery direct shipper's permit holders.

Cross Reference: Sections 5.31 and 54.06 of the Alcoholic Beverage Code are affected by the adopted rule amendment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 31, 2008.

TRD-200800551
Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Effective date: February 20, 2008
Proposal publication date: November 16, 2007
For further information, please call: (512) 206-3204

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 1. AGENCY ADMINISTRATION
SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §1.18

The Texas Higher Education Coordinating Board adopts amendments to §1.18(e)(2) and (3) concerning the operation of Education Research Centers without changes to the proposed text as published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8643). Specifically, this amendment will provide clarification to the rules for the operation of the Education Research Centers created by Texas Education Code, §1.005.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §1.005.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 29, 2008.

TRD-200800487
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: February 18, 2008
Proposal publication date: November 30, 2007
For further information, please call: (512) 427-6114

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CHAPTER 4. RULES APPLYING TO ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS
SUBCHAPTER B. TRANSFER OF CREDIT, CORE CURRICULUM AND FIELD OF STUDY CURRICULA

19 TAC §4.28, §4.30

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §4.28 and §4.30 concerning the Texas core curriculum without changes to the proposed text as published in the November 9, 2007, issue of the *Texas Register* (32 TexReg 8078). Two changes were proposed. First, Coordinating Board staff has received a number of questions during the past year regarding appropriate courses to fulfill the Mathematics Component Area requirement. The change specifies that the first college-level mathematics course, including but not limited to introductory statistics, logic, college algebra, or any more advanced math course for which the student is qualified to take upon enrollment, should be allowed to fulfill the component area requirement. Second, the Coordinating Board is charged to specify a reporting period for the submission of institutional reports regarding the effectiveness of the core curriculum at the institution. The Southern Association of Colleges and Schools (SACS) has recently increased its interest in and attention to this portion of the undergraduate curriculum as part of its revisions to the accreditation reaffirmation process and requires essentially the same information that has been required in these institutional reports to the Coordinating Board. The Coordinating Board's reporting period should be changed so that it can be aligned with that of SACS in order to eliminate unnecessary duplication of reporting requirements.

No comments were received regarding this amendment.

The amendments are adopted under Texas Education Code, §61.827, which authorizes the Coordinating Board to adopt rules to implement the provisions of the subchapter, including those in Texas Education Code, §61.822(a), requiring the Coordinating Board to adopt a statement of the content, component areas, and objectives of the core curriculum Texas Education Code, §61.824, regarding the evaluation of the institution's core curriculum and reporting of the evaluations to the Coordinating Board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 29, 2008.

TRD-200800494

Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: February 18, 2008
Proposal publication date: November 9, 2007
For further information, please call: (512) 427-6114

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CHAPTER 13. FINANCIAL PLANNING
SUBCHAPTER B. FORMULA FUNDING

19 TAC §13.22

The Texas Higher Education Coordinating Board adopts amendments to §13.22(b)(2) concerning Community and Technical College Formulas without changes to the proposed text as published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8644). Specifically, this amendment will provide clarification to the rules for the reporting of fundable operating expenses.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §61.059.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 29, 2008.

TRD-200800488
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: February 18, 2008
Proposal publication date: November 30, 2007
For further information, please call: (512) 427-6114

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CHAPTER 17. RESOURCE PLANNING
SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §17.3

The Texas Higher Education Coordinating Board adopts amendments to §17.3, concerning Campus Planning General Provisions, without changes to the proposed text as published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8644). Specifically, the adopted amendments will change the title of Chapter 17 to Resource Planning, delete the definition for Associate Commissioner, add definitions for Deputy Assistant Commissioner and Deputy Commissioner for Academic Planning and Policy, and renumber the definitions.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §§61.0572, 61.058, and 51.927.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 29, 2008.

TRD-200800489
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: February 18, 2008
Proposal publication date: November 30, 2007
For further information, please call: (512) 427-6114

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SUBCHAPTER B. BOARD APPROVAL

19 TAC §17.12

The Texas Higher Education Coordinating Board adopts amendments to §17.12 concerning Campus Planning Board Approval without changes to the proposed text as published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8647). Specifically, the adopted amendments will change the title of Chapter 17 to Resource Planning, delegate approval authority for the Deputy Commissioner for Academic Planning and Policy when acting on behalf of the Commissioner, delete references to Associate Commissioner, and add delegated approval authority for the Deputy Assistant Commissioner when acting on behalf of the Assistant Commissioner.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §§61.0572, 61.058, and 51.927.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 29, 2008.

TRD-200800490
Bill Franz
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Texas Higher Education Coordinating Board
Effective date: February 18, 2008
Proposal publication date: November 30, 2007
For further information, please call: (512) 427-6114

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SUBCHAPTER C. RULES APPLYING TO ALL PROJECTS

19 TAC §17.21

The Texas Higher Education Coordinating Board adopts amendments to §17.21 concerning Application Procedures without changes to the proposed text as published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8648). Specifically, the adopted amendments will change the Chapter 17 title to Resource Planning and delete references to Associate Commissioner.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §§61.0572, 61.058, and 51.927.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 29, 2008.

TRD-200800491
Bill Franz
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Texas Higher Education Coordinating Board
Effective date: February 18, 2008
Proposal publication date: November 30, 2007
For further information, please call: (512) 427-6114

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SUBCHAPTER F. RULES APPLYING TO REAL PROPERTY ACQUISITION PROJECTS

19 TAC §17.50

The Texas Higher Education Coordinating Board adopts amendments to §17.50 concerning Campus Planning Rules Applying to Real Property Acquisition Projects without changes to the proposed text as published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8648). Specifically, the adopted amendments will change the Chapter 17 title to Resource Planning and clarify language.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §§61.0572, 61.058, and 51.927.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 29, 2008.

TRD-200800492
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: February 18, 2008
Proposal publication date: November 30, 2007
For further information, please call: (512) 427-6114

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CHAPTER 22. GRANT AND SCHOLARSHIP PROGRAMS

SUBCHAPTER S. PROFESSIONAL NURSING SHORTAGE REDUCTION PROGRAM

19 TAC §§22.501 - 22.508

The Texas Higher Education Coordinating Board adopts new §§22.501 - 22.508 concerning the grant for Nursing Shortage Reduction Programs without changes to the proposed text as published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8649). Specifically, these adopted new sections will provide rules regarding the disbursement of funds for the Professional Nursing Shortage Reduction Program.

No comments were received regarding the new sections.

The new sections are adopted under the Texas Education Code, §61.9624.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 29, 2008.

TRD-200800493
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: February 18, 2008
Proposal publication date: November 30, 2007
For further information, please call: (512) 427-6114

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TITLE 22. EXAMINING BOARDS

PART 11. TEXAS BOARD OF NURSING

CHAPTER 214. VOCATIONAL NURSING EDUCATION

22 TAC §214.2

The Texas Board of Nursing (BON) adopts amendments to 22 Texas Administrative Code §214.2, concerning Definitions relating to Vocational Nursing Education, with changes to the proposed text as published in the November 9, 2007, issue of the *Texas Register* (32 TexReg 8083).

The Sunset Advisory Commission Report to the 80th Legislature, May 2007, *Recommendations, Change in Statute and Management Action*, made recommendations, and House Bill 2426 (Board's Sunset Bill), implemented those recommendations, resulting in changes to Chapter 301 of the Texas Occupations Code (Nursing Practice Act). The adopted amendments implement new §301.157(a-d) of the Nursing Practice Act.

The Texas Nurses Association (TNA) submitted comments in response to the proposed amendments.

Comment: The definition of Assistant Program Director in §214.2(4) is unclear about what it means to have director or coordinator assume responsibilities other than program: Is this temporary such as vacation, illness/teaching courses?

Response: Section 214.6(e)(2) adds clarification in the statement that "the director may have responsibilities other than the program provided that an assistant program coordinator/lead instructor is designated to assist with the program management." The definition describes the role of the individual designated as assistant program director. The intent in §214.6(e)(2) is to insure that the director has adequate time for administrative responsibilities for the program in question. Other responsibilities refers to other administrative responsibilities in the school setting since some directors administer several types of nursing programs or may hold other academic positions in the setting. The responsibilities in question are academic responsibilities or school re-

sponsibilities. Since this wording has not created confusion in the past, the Board recommends no change.

Comment: Inclusion of the word "employed" in the definition of faculty member in §214.2(21) needs clarification since some faculty may not be "employed"--they may be provided by a hospital without cost.

Board Response: This statement does not specify that the faculty member is hired by the school, but that all or a portion of their job responsibility is to teach for the program. The faculty member is then considered an employed member of the faculty, either full time or part time, and they are included in the faculty count. The salary of this individual may be paid by a hospital and their job description for the hospital would include their teaching duties. This distinguishes this individual from a preceptor who is employed by a health care facility but mentors the student in clinical experiences. The preceptor is not considered as one of the employed faculty. The Board recommends no change.

Comment: The definition for faculty waiver in §214.2(22) is not clear. The wording needs to include the temporary nature of the waiver rather than stating "for a specified period of time."

Board Response: The Board agrees and will change the language to include the year limitation on waivers in §214.2(22) and §215.2(19).

The amendments are adopted pursuant to the authority of Texas Occupations Code §301.151 and §301.152 which authorizes the BON to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act.

§214.2. Definitions.

Words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

(1) Affidavit of Graduation--an official Board form containing an approved nursing educational program's curriculum components and hours, a statement attesting to an applicant's qualifications for vocational nurse licensure in Texas, the official school seal and the signature of the nursing program director/coordinator.

(2) Affiliating Agency or Clinical Facility--a health care facility or agency which provides learning experiences for students.

(3) Approved vocational nursing educational program--a vocational nursing educational program approved by the Texas Board of Nursing.

(4) Assistant Program Coordinator--a registered nurse faculty member in the vocational nursing educational program who is designated to assist with program management when the director or coordinator assumes responsibilities other than the program.

(5) Board--the Texas Board of Nursing composed of members appointed by the Governor for the State of Texas.

(6) Class Hours--those hours allocated to didactic instruction and testing in each subject.

(7) Clinical Conferences--scheduled presentations and discussions of aspects of client care experiences.

(8) Clinical Learning Experiences--faculty planned and guided learning activities designed to assist students to meet stated program and course outcomes and to safely apply knowledge and skills when providing nursing care to clients across the life span as appropriate to the role expectations of the graduates. These experiences occur in nursing skills and computer laboratories; in simulated clinical settings; in a variety of affiliating agencies or clinical practice settings including, but not limited to: acute care facilities, extended care facilities, clients' residences, and community agencies; and in associated clinical conferences.

(9) Clinical Practice Hours--hours spent in actual client care assignments, simulated laboratory experiences, observations, clinical conferences and clinical instruction.

(10) Clinical Preceptor--a licensed nurse who meets the minimum requirements in §214.10(l)(5) of this chapter (relating to Management of Clinical Learning Experiences and Resources), not paid as a faculty member by the controlling agency, and who directly supervises clinical learning experiences for no more than two students. A clinical preceptor facilitates student learning in a manner prescribed by a signed written agreement between the educational institution, preceptor, and affiliating agency (as applicable).

(11) Compliance Audit--a document required by the Board to be submitted at a specified time by the nursing educational program director or coordinator that serves as verification of the program's adherence to this chapter.

(12) Conceptual Framework--theories or concepts giving structure to the curriculum and enabling faculty to make consistent decisions about all aspects of curriculum development, implementation, and evaluation.

(13) Concurrent Theory and Skills Laboratory Experiences--planned experiences which coincide or operate at the same time to provide a common effect.

(14) Controlling Agency--institution that has direct authority and administrative responsibility for the operation of a board approved nursing educational program.

(15) Correlated Theory and Clinical Practice--didactic and clinical experiences which have a reciprocal relationship or mutually complement each other.

(16) Course--organized subject content and related activities, which may include didactic, laboratory and/or clinical experiences, planned to achieve specific objectives within a given time period.

(17) Curriculum--course offerings which, in aggregate, make up the total learning activities in a program of study.

(18) Differentiated Entry Level Competencies--the expected educational outcomes to be demonstrated by nursing students at the time of graduation as published in *Differentiated Entry Level Competencies of Graduates of Texas Nursing Programs, Vocational (VN), Diploma/Associate Degree (Dip/ADN), Baccalaureate (BSN), September 2002*.

(19) Director or Coordinator--denotes the nurse directly in charge chosen by the controlling agency, approved by the Board, and who is administratively responsible for the nursing educational program.

(20) Examination Year--the period beginning January 1 and ending December 31 used for the purposes of determining programs' NCLEX-PN™ examination pass rates.

(21) Faculty member--an individual employed to teach in the vocational nursing educational program who meets the requirements as stated in §214.7 of this chapter (relating to Faculty Qualifications and Faculty Organization).

(22) Faculty waiver--a waiver granted a director or coordinator of a vocational nursing educational program and submitted to the Board on a notarized notification form, or by the Board, as speci-

fied in §214.7(c)(2)(C) of this chapter, to an individual who is currently licensed as an LVN or RN, or has a privilege to practice, as appropriate, in Texas and who is approved to be employed as a faculty member which is valid for up to one year.

(23) Lead Instructor--a licensed nurse approved by the Board who has the delegated administrative authority for the program.

(24) Mobility--the ability to advance without educational barriers.

(25) Non-Nursing Faculty--instructors who teach non-nursing theory courses such as pharmacology, nutrition, and anatomy and physiology and who have educational preparation appropriate to the assigned teaching responsibilities.

(26) Objectives/Outcomes--clear statements of expected behaviors that are attainable and measurable.

(A) Program Objectives/Outcomes--broad statements used to direct overall student learning toward the achievement of expected program outcomes.

(B) Clinical Objectives/Outcomes--statements describing expected student behaviors throughout the curriculum and which represent progression of students' cognitive, affective and psychomotor achievement in clinical practice across the curriculum.

(C) Course Objectives/Outcomes--statements describing expected behavioral changes in the learner upon successful completion of specific curriculum content and which serve as the mechanism for evaluation of student progression.

(27) Observational experience--an assignment to a facility or unit where students observe activities within the facility and/or the role of nursing within the facility, but where students do not participate in patient/client care.

(28) Pass rate--the percentage of first-time candidates within one examination year who pass the National Council Licensure Examination for Vocational Nurses (NCLEX-PN™).

(29) Philosophy/Mission--statement of concepts expressing fundamental values and beliefs regarding human nature as they apply to nursing education and practice and upon which the curriculum is based.

(30) Program of Study--the courses and learning experiences that constitute the requirements for completion of a vocational nursing educational program.

(31) Proprietary Schools--educational entities defined by Texas Workforce Commission as "career schools and colleges."

(32) Recommendation--a suggestion based upon program assessment indirectly related to the rules to which the program must respond but in a method of their choosing.

(33) Requirement--mandatory criterion based on program assessment directly related to the rule that must be addressed in the manner prescribed.

(34) Shall--denotes mandatory requirements.

(35) Staff--Employees of the Texas Board of Nursing.

(36) Supervision--immediate availability of a faculty member or clinical preceptor to coordinate, direct, and observe first hand the practice of students.

(37) Survey Visit--an on-site visit to a vocational nursing educational program by a Board representative. The purpose of the visit is to evaluate the program of learning by gathering data to determine whether the program is meeting the Board's requirements as specified in §§214.2 - 214.13 of this chapter.

(38) Systematic Approach--the organized process in nursing which provides individualized, goal-directed nursing care which includes the vocational nurse's role in participating in data collection, assessment activities, planning and implementing client care, and evaluating the client's responses to nursing interventions and identification of client needs.

(39) Texas Higher Education Coordinating Board (THECB)--a state agency created by the Legislature to provide coordination for the Texas higher education system, institutions, and governing boards, through the efficient and effective utilization and concentration of all available resources and the elimination of costly duplication in program offerings, faculties, and physical plants (Texas Education Code, Title 3, Subtitle B, Chapter 61).

(40) Texas Workforce Commission (TWC)--the state agency charged with overseeing and providing workforce development services to employers and job seekers of Texas (Texas Labor Code, Title 4, Subtitle B, Chapter 301).

(41) Vocational Nursing Educational Program--a unit or entity within an educational setting which provides a program of study preparing graduates who are competent to practice safely and who are eligible to take the NCLEX-PN™ examination. Types of programs:

(A) Extension program--a site other than the program's main location where the program of study is provided, duplicating the current curriculum and teaching resources.

(B) MEEP--Multiple Entry Exit Program that offers mobility options for students.

(C) New program--a newly created program of study in which the curriculum, teaching resources, or program hours required to complete the program differs from that of the main location.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 30, 2008.

TRD-200800518
Katherine Thomas
Executive Director
Texas Board of Nursing
Effective date: February 19, 2008
Proposal publication date: November 9, 2007
For further information, please call: (512) 305-6823

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CHAPTER 215. PROFESSIONAL NURSING EDUCATION

22 TAC §§215.2 - 215.4

The Texas Board of Nursing (BON) adopts amendments to 22 Texas Administrative Code §215.2, concerning Definitions; §215.3, concerning Program Development, Expansion, and Closure; and §215.4, concerning Approval, relating to Professional Nursing Education. Section 215.2 and §215.3 are adopted with changes to the proposed text as published in the November 9, 2007, issue of the *Texas Register* (32 TexReg 8088). Section

215.4 is adopted without changes to the proposed text and will not be republished.

The Sunset Advisory Commission Report to the 80th Legislature, May 2007, *Recommendations, Change in Statute and Management Action*, made recommendations, and House Bill 2426 (Board's Sunset Bill), implemented those recommendations, resulting in changes to Chapter 301 of the Texas Occupations Code (Nursing Practice Act). The adopted amendments implement new §301.157(a-d) of the Nursing Practice Act.

Comments to the proposed amendments were received from the Texas Nurses Association (TNA).

Comment: Definition for "faculty waivers" needs to include the temporary nature of the waiver rather than stating "for a specified period of time."

Response: The Board agrees and will change the language to include the year limitation on waivers in §215.2(19).

Comment: The wording in §215.3(a)(1)(B)(i) and (ii) is confusing. It says the process must precede, then it says only that the approval by THECB and TWC must precede. I think they are two different things. The flaw should be that the submission to all can be concurrent. THECB and TWC must complete their full approval processes and then the BON institutes its approval process.

Response: Board agrees that there is repetition and will delete §215.3(a)(1)(B)(i). Because the deletion of this clause leaves clause (ii) only, clause (ii) will be combined with the initial sentence in §215.3(a)(1)(B).

Comment: The wording in §215.3(a)(1)(G) says that there must be a "process in place by 2015 to ensure that. . . ." The board does not want a process, but wants a finalized plan so that by 2015 the graduates are entitled to a degree.

Response: House Bill 2426 states that "a diploma program of study in this state that leads to an initial license as a registered nurse under this chapter and that is completed on or after December 31, 2014, must entitle a student to receive a degree on the student's successful completion of a degree program of a public or private institution of higher education. . . ." Following deliberations with legislators and constituents, the consensus was that the intent was for diploma programs to establish a plan whereby their graduates would be entitled to an academic degree. This allows diploma programs the prerogative of determining how the awarding of degrees would occur. The outcome is the same, but there may be a difference in semantics. The Board does not plan to change the wording.

Comment: Is there an appeal process in §215.3(a)(1)(N)? Perhaps it is addressed elsewhere.

Response: There is no appeal process described in the rule. The program has an opportunity to answer questions and clarify issues at the Board meeting when the proposal is presented. If a program is denied, they may reapply after a twelve-month waiting period.

Comment: In §215.4(a)(2)(B) the sentence at the top suggests that the programs with full approval status may do certain things. . .on their own. Is that really the intent? Does the board mean that programs must have full accreditation status before they SEEK to initiate and SEEK to grant?

Response: This wording states that programs must have full approval status before they can branch out to extension sites or seek to use faculty who are not fully qualified (but require waivers). This means that new programs on initial approval (who have not had a first graduating class or have established an acceptable pass rate) or programs on warning or conditional approval (because of low pass rate) may not branch out to extension sites or use faculty who are not fully qualified (and require waivers). This puts a few more restrictions on new programs and on programs experiencing difficulties. Expansion to extension sites or using faculty who require additional mentoring would place additional challenges on new programs or programs experiencing difficulties. The Board does not plan to change the wording.

Comment: The statement in §215.4(c)(4)(B)(iii) seems to nullify the prior points that the board made about national accreditation. Why would the board accept (and thus have to review) another state's standards? Why not make the requirement that, like Texas schools, if the out of state school is accredited by a national nursing accrediting body. . . .

Response: This wording was taken from the statute: House Bill 2426, §301.157(b)(6)(C): "The board shall: deny or withdraw approval from a school of nursing or educational program that: fails to maintain the approval of the state board of nursing of another state and the board under which it was approved." The Board does not plan to change the wording.

Comment: Are there implications for Associate degree programs for accreditation? For example, if all ADN programs aren't accredited nationally, do these changes alter the BON workload? I think not and if that was part of the rationale for changes, the issue isn't fully addressed.

Response: The Board assumes that this question relates to §215.4(c)(4) which states that the "Texas Board of Nursing will select one or more national nursing accrediting agencies, recognized by the United States Department of Education and determined by the Board to have standards equivalent to the Board's ongoing approval standards." The question seems to ask if all ADN programs are required to have accreditation from a national nursing accrediting agency. No, they are not required to have this accreditation; it is voluntary. If programs hold national nursing accreditation from an agency determined by the Board to have standards equivalent to the Board's ongoing approval standards, maintain that accreditation and an acceptable pass rate, they will be exempt from Board rules that require ongoing approval. Programs not holding national nursing accreditation will be subject to Board rules for ongoing approval. These changes were not made to alter the BON workload. The Board does not think that changes need to be made in response to this comment.

One final change the Board makes is the addition of the trademark symbol in §215.2(28)(E) behind the word, NCLEX-PN.

The amendments are adopted pursuant to the authority of Texas Occupations Code §301.151 and §301.152 which authorizes the BON to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act.

§215.2. Definitions.

Words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

(1) Accredited nursing educational program--a professional nursing educational program having voluntary accreditation by a Board-approved nursing accrediting body.

(2) Affiliating Agency or Clinical Facility--a health care facility or agency which provides learning experiences for students.

(3) Alternative practice settings--settings which provide opportunities for clinical learning experiences although their primary function is not the delivery of health care.

(4) Approved professional nursing educational program--a professional nursing educational program approved by the Texas Board of Nursing.

(5) Articulation--a planned process between two or more educational systems to assist students to make a smooth transition from one level of education to another without duplication in learning.

(6) Board--the Texas Board of Nursing composed of members appointed by the Governor for the State of Texas.

(7) Clinical learning experiences--faculty-planned and guided learning activities designed to assist students to meet stated program and course outcomes and to safely apply knowledge and skills when providing nursing care to clients across the life span as appropriate to the role expectations of the graduates. These experiences occur in nursing skills and computer laboratories; in simulated clinical settings; in a variety of affiliating agencies or clinical practice settings including, but not limited to: acute care facilities, extended care facilities, clients' residences, and community agencies; and in associated clinical conferences.

(8) Clinical preceptor--a registered nurse or other licensed health professional who meets the minimum requirements in §215.10(f)(5) of this chapter (relating to Management of Clinical Learning Experiences and Resources), not paid as a faculty member by the governing institution, and who directly supervises a student's clinical learning experience. A clinical preceptor facilitates student learning in a manner prescribed by a signed written agreement between the educational institution, preceptor, and affiliating agency (as applicable).

(9) Clinical teaching assistant--a registered nurse licensed in Texas, who is employed to assist in the clinical area and work under the supervision of a Master's or Doctorally prepared nursing faculty member and who meets the minimum requirements in §215.10(g)(4) of this chapter.

(10) Compliance Audit--a document required by the Board to be submitted at a specified time by the nursing educational program dean or director that serves as verification of the program's adherence to this chapter.

(11) Conceptual Framework--theories or concepts giving structure to the curriculum and enabling faculty to make consistent decisions about all aspects of curriculum development, implementation, and evaluation.

(12) Course--organized subject content and related activities, which may include didactic, laboratory and/or clinical experiences, planned to achieve specific objectives within a given time period.

(13) Curriculum--course offerings, which in aggregate, make up the total learning activities in a program of study.

(14) Dean or Director--a registered nurse who is accountable for administering a pre-licensure nursing educational program, who meets the requirements as stated in §215.6(f) of this chapter (relating to Administration and Organization), and is approved by the Board.

(15) Differentiated Entry Level Competencies--the expected educational outcomes to be demonstrated by nursing students at the time of graduation as published in *Differentiated Entry Level Competencies of Graduates of Texas Nursing Programs, Vocational (VN), Diploma/Associate Degree (Dip/ADN), Baccalaureate (BSN), September 2002*.

(16) Examination year--the period beginning October 1 and ending September 30 used for the purposes of determining programs' NCLEX-RN™ examination pass rates.

(17) Extension Program--instruction provided by an approved professional pre-licensure nursing educational program providing a variety of instructional methods to any location(s) other than the program's main campus and where students are required to attend activities such as testing, group conferences, and/or campus laboratory. An extension program may offer the entire identical curriculum or may offer a single course or multiple courses.

(A) Complete program--provides the entire program of study at a site other than the program's main campus.

(B) Partial program--provides a course, or courses, from the program of study at a site other than the program's main campus.

(18) Faculty member--an individual employed to teach in the professional nursing educational program who meets the requirements as stated in §215.7 of this chapter (relating to Faculty Qualifications and Faculty Organization).

(19) Faculty waiver--a waiver granted by a dean or director of a professional nursing educational program and submitted to the Board on a notarized notification form, or by the Board, as specified in §215.7(c)(1)(E)(iii) of this chapter, to an individual who has a baccalaureate degree in nursing and is currently licensed in Texas, or has a privilege to practice, to be employed as a faculty member which is valid for up to one year.

(20) Governing institution--the entity with administrative and operational authority over a Board-approved professional nursing educational program.

(21) Health care professional--an individual other than a RN who holds at least a bachelor's degree in the health care field, including, but not limited to: respiratory therapists, physical therapists, occupational therapists, dieticians, pharmacists, physicians, social workers and psychologists.

(22) Mobility--the ability to advance without educational barriers.

(23) Non-Nursing Faculty--instructors who teach non-nursing theory courses such as pharmacology, pathophysiology, research, management and statistics, and who have educational preparation appropriate to the assigned teaching responsibilities.

(24) Objectives/Outcomes--clear statements of expected behaviors that are attainable and measurable.

(A) Program Objectives/Outcomes--broad statements used to direct the overall student learning toward the achievement of expected program outcomes.

(B) Clinical Objectives/Outcomes--statements describing expected student behaviors throughout the curriculum and which represent progression of students' cognitive, affective and psychomotor achievement in clinical practice across the curriculum.

(C) Course Objectives/Outcomes--statements describing expected behavioral changes in the learner upon successful completion of specific curriculum content and which serve as the mechanism for evaluation of student progression.

(25) Observational experience--an assignment to a facility or unit where students observe activities within the facility and/or the role of nursing within the facility, but where students do not participate in patient/client care.

(26) Pass rate--the percentage of first-time candidates within one examination year who pass the National Council Licensure Examination for Registered Nurses (NCLEX-RN™).

(27) Philosophy/Mission--statement of concepts expressing fundamental values and beliefs regarding human nature as they apply to nursing education and practice and upon which the curriculum is based.

(28) Professional Nursing Educational Programs--an educational entity that offers the courses and learning experiences that prepares graduates who are competent to practice safely and who are eligible to take the NCLEX-RN™ examination and often referred to as a pre-licensure nursing program. Types of pre-licensure nursing programs:

(A) Associate degree nursing educational program--a program leading to an associate degree in nursing conducted by an educational unit in nursing within the structure of a college or university.

(B) Baccalaureate degree nursing educational program--a program leading to a bachelor's degree in nursing conducted by an educational unit in nursing which is a part of a senior college or university.

(C) Master's degree nursing educational program--a program leading to a master's degree, which is an individual's first professional degree in nursing, and conducted by an educational unit in nursing within the structure of a senior college or university.

(D) Diploma nursing educational program--a program leading to a diploma in nursing conducted by a single purpose school usually under the control of a hospital.

(E) MEEP--a Multiple Entry-Exit Program which allows students to challenge the NCLEX-PN™ examination when they have completed sufficient course work in a professional nursing educational program that will meet all requirements for the examination.

(29) Program of study--the courses and learning experiences that constitute the requirements for completion of a professional pre-licensure nursing educational program (associate degree nursing educational program, baccalaureate degree nursing educational program, master's degree nursing educational program, or diploma nursing educational program).

(30) Recommendation--a suggestion based upon program assessment indirectly related to the rules to which the program must respond but in a method of their choosing.

(31) Requirement--mandatory criterion based upon program assessment directly related to the rules that must be addressed in the manner prescribed.

(32) Shall--denotes mandatory requirements.

(33) Staff--employees of the Texas Board of Nursing.

(34) Supervision--immediate availability of a faculty member, clinical preceptor, or clinical teaching assistant to coordinate, direct, and observe first hand the practice of students.

(35) Survey Visit--an on-site visit to a professional nursing educational program by a Board representative. The purpose of the visit is to evaluate the program of learning by gathering data to determine whether the program is meeting the Board's requirements as specified in §§215.2 - 215.13 of this chapter.

(36) Systematic Approach--the organized process in nursing which provides individualized, goal-directed nursing care by performing comprehensive nursing assessments regarding the health status of the client, making nursing diagnoses that serve as the basis for the strategy of care, developing a plan of care based on the assessment and nursing diagnosis, implementing nursing care, and evaluating the client's responses to nursing interventions.

(37) Texas Higher Education Coordinating Board (THECB)--a state agency created by the Legislature to provide coordination for the Texas higher education system, institutions, and governing boards, through the efficient and effective utilization and concentration of all available resources and the elimination of costly duplication in program offerings, faculties, and physical plants (Texas Education Code, Title 3, Subtitle B, Chapter 61).

(38) Texas Workforce Commission (TWC)--the state agency charged with overseeing and providing workforce development services to employers and job seekers of Texas (Texas Labor Code, Title 4, Subtitle B, Chapter 301).

§215.3. Program Development, Expansion, and Closure.

(a) New Programs.

(1) Proposal to establish a new professional pre-licensure nursing educational program.

(A) The proposal to establish a professional nursing educational program may be submitted by:

(i) a college or university accredited by an agency recognized by the THECB or holding a certificate of authority from the THECB under provisions leading to accrediting of the institution in due course; or

(ii) a single-purpose school, such as a hospital, proposing a new diploma program.

(B) The new professional nursing educational program must be approved/licensed by the appropriate Texas agency, i.e., THECB, TWC, before approval can be granted by the Texas Board of Nursing for the program to be implemented. The proposal to establish a new professional nursing educational program may be submitted to the Board at the same time that an application is submitted to THECB or TWC, but the proposal cannot be approved by the Board until such time as the proposed program is approved by THECB or TWC.

(C) The process to establish a new professional nursing educational program shall be initiated with the Board office one year prior to the anticipated start of the program.

(D) The proposal shall be completed under the direction/consultation of a registered nurse who meets the approved qualifications for a program director according to §215.6 of this chapter (relating to Administration and Organization).

(E) Sufficient nursing faculty with appropriate expertise shall be in place for development of the curriculum component of the program.

(F) The proposal shall include information outlined in applicable Board guidelines.

(G) A proposal for a new diploma nursing educational program must include a written plan addressing the legislative mandate that all nursing diploma programs in Texas must have a process in place by 2015 to ensure that their graduates are entitled to receive a degree from a public or private institution of higher education accredited by an agency recognized by the THECB and. at a minimum, entitle a graduate of the diploma program to receive an associate degree in nursing.

(H) After the proposal is submitted and reviewed, a preliminary survey visit shall be conducted by Board staff prior to presentation to the Board.

(I) The proposal shall be considered by the Board following a public hearing at a regularly scheduled meeting of the Board. The Board may approve the proposal and grant initial approval to the new program, may defer action on the proposal, or may deny further consideration of the proposal.

(J) The program shall not admit students until the Board approves the proposal and grants initial approval.

(K) Prior to presentation of the proposal to the Board, evidence of approval from the appropriate regulatory/funding agencies shall be provided.

(L) After the proposal is approved, an initial approval fee shall be assessed per §223.1 of this title (relating to Fees).

(M) A proposal without action for one calendar year shall be inactivated.

(N) If the Board denies further consideration of a proposal, the educational unit in nursing within the structure of a school, including a college, university, or proprietary school (career school or college), or a hospital must wait a minimum of twelve calendar months from the date of the denial before submitting a new proposal to establish a professional pre-licensure nursing educational program.

(2) Survey visits shall be conducted, as necessary, by staff until full approval status is granted.

(b) Extension Program.

(1) Only nursing programs that have full approval are eligible to initiate or modify extension programs.

(2) Instruction provided for the extension program may include a variety of instructional methods, shall be congruent with the program's curriculum plan, and shall enable students to meet the goals, objectives, and competencies of the educational program and requirements of the Board as stated in §§215.2 - 215.13 of this chapter.

(3) A program intending to establish an extension program shall:

(A) Notify the Board office at least four (4) months prior to implementation of extension programs by any approved program;

(B) Submit required information according to Board-approved guidelines;

(C) Provide documentation of notification to the Regional Council of the governing institution about plans for establishment of extension programs to the Board office at least four (4) months prior to implementation, as appropriate; and

(D) Provide evidence of approval from the THECB, TWC and/or other regulating/accrediting bodies, as applicable, to the Board four (4) months prior to implementation, as appropriate.

(4) Extension programs of professional pre-licensure nursing educational programs which have been closed may be reactivated by submitting notification of reactivation to the Board at least four (4) months prior to reactivation, using the Board guidelines for initiating an extension program.

(5) A program intending to close an extension program shall:

(A) Notify the Board at least four (4) months prior to closure of the extension program; and

(B) Submit required information according to Board-approved guidelines including:

(i) reason for closing the program;

(ii) date of intended closure;

(iii) academic provisions for students; and

(iv) provisions made for access to and storage of vital school records.

(c) Transfer of Administrative Control by Governing Institutions. The authorities of the governing institution shall notify the Board office in writing of an intent to transfer the administrative authority of the program. This notification shall follow Board guidelines.

(d) Closing a Program.

(1) When the decision to close a program which provides the entire program of study has been made, the director must notify the Board and submit a written plan for closure which includes the following:

(A) reason for closing the program;

(B) date of intended closure;

(C) academic provisions for students;

(D) provisions made for access to and safe storage of vital school records, including transcripts of all graduates; and

(E) methods to be used to maintain requirements and standards until the program closes.

(2) The program shall continue within standards until all classes, which are enrolled at the time of the decision to close, have graduated. In the event this is not possible, a plan shall be developed whereby students may transfer to other approved programs.

(e) Approval of a Nursing Educational Program Outside Texas' Jurisdiction to Conduct Clinical Learning Experiences in Texas.

(1) The nursing educational program outside Texas' jurisdiction seeking approval to conduct clinical learning experiences in Texas should initiate the process with the Texas Board of Nursing two to three months prior to the anticipated start of the clinical learning experiences in Texas.

(2) A written request and the required supporting documentation shall be submitted to the Board office following Board guidelines.

(3) Evidence that the program has been approved/licensed by the appropriate Texas agency, i.e., THECB, to conduct business in the State of Texas must be obtained before approval can be granted by the Texas Board of Nursing for the program to conduct clinical learning experiences in Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 30, 2008.

TRD-200800544

Katherine Thomas
Executive Director
Texas Board of Nursing
Effective date: February 19, 2008
Proposal publication date: November 9, 2007
For further information, please call: (512) 305-6823

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CHAPTER 217. LICENSURE, PEER ASSISTANCE AND PRACTICE

22 TAC §217.13

The Texas Board of Nursing (BON) adopts the repeal of §217.13, concerning Peer Assistance Programs. The repeal is adopted without changes to the proposed text as published in the November 2, 2007, issue of the *Texas Register* (32 TexReg 7845).

House Bill 2426 (Sunset Bill) puts forth several requirements for a peer assistance program utilized by the BON that made it necessary to repeal the old rule and adopt a new rule addressing those requirements. Concurrent with this adopted repeal of the existing rule is an adopted new rule that implements those requirements listed in the Sunset Bill, amending §301.4106, Texas Occupations Code, of the Nursing Practice Act.

No comments were received in response to the proposed repeal.

The repeal is adopted pursuant to the authority of Texas Occupations Code §301.151 which authorizes the BON to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 29, 2008.

TRD-200800512
Katherine Thomas
Executive Director
Texas Board of Nursing
Effective date: February 18, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 305-6823

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22 TAC §217.13

The Texas Board of Nursing (BON) adopts §217.13 (Peer Assistance Programs) with changes to the proposed rule. The proposed rule was published in the November 2, 2007, edition of the *Texas Register* (32 TexReg 7845). Concurrent with this adopted new rule is the adopted repeal of the old rule.

House Bill 2426 (Sunset Bill) puts forth several requirements for a peer assistance program utilized by the BON. The Nursing Practice Act, Texas Occupations Code §301.4105 requires that the BON be notified when a nurse suspected of impaired behavior is alleged to have also committed a nursing practice violation. In addition, the BON is required in §301.4106 to adopt rules that develop guidelines for its peer assistance programs by: outlining the roles and responsibilities of the board and a peer assistance program; outlining the process for a peer assistance program to refer to the board complaints alleging a violation of the practice of nursing; establishing requirements for successfully completing a peer assistance program and for notifying the board of the successful completion by a nurse the board has ordered to attend or referred to the program; and establishing a procedure for evaluating the success of a peer assistance program established or approved by the board. The adopted new §217.13 implements these requirements.

The Board received two comments on the proposed new rule, from an individual and the Texas Nurses Association (TNA).

Comment: The TNA requests an editorial change in subsection (e)(2)(D) relating to minimum conditions associated with participation in the peer assistance contract and requests that it be amended to include the phrase "and for cause." TNA states that the edit is non-substantive.

Response: After review of TNA's comment, the Board agrees that the phrase "and for cause" will clarify the meaning intended by the use of "random drug screens" during program monitoring and that it is a non-substantive change.

Comment: The individual commenter does not suggest a particular amendment or change in §217.13. Rather, the comments express concerns that §217.13 requires the disclosure of personal health information with regard to mental health diagnosis and addiction to employers when there are no practice violations. The commenter believes such disclosures are in violation of Title II of the Americans with Disabilities Act and argues that persons with chemical dependency and mental illness are being singled out and treated differently because of their diagnosis. Additionally, the commenter states that a nurse's right to privacy over personal mental health information should not be compromised because of the disease of addiction or mental health diagnosis.

Response: The Board believes that proposed §217.13 is a lawful rule consistent with the Board's statutory authority and mission to protect the public welfare by ensuring that each person holding a license as a nurse in Texas is competent to practice safely. A legitimate concern to public safety exists regarding nurses whose practice is impaired or suspected of being impaired by chemical dependency, mental illness, or diminished mental capacity. The peer assistance program for nurses approved by the Board under chapter 467, Texas Health and Safety Code, will identify, monitor, and assist with locating appropriate treatment for those nurses whose practice is impaired or suspected of being impaired by chemical dependency, mental illness or diminished mental capacity so that they may return to practice safe nursing.

The proposal is pursuant to the authority of Texas Occupations Code §301.151 which authorizes the BON to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act.

§217.13. Peer Assistance Program.

(a) A peer assistance program for nurses approved by the Board under chapter 467, Health and Safety Code, will identify, monitor, and assist with locating appropriate treatment for those nurses whose practice is impaired or suspected of being impaired by chemical dependency, mental illness or diminished mental capacity so that they may return to practice safe nursing.

(b) Role of the Board of Nursing and Peer Assistance Program.

(1) The Board of Nursing will retain the sole and exclusive authority to discipline a nurse who has committed a practice violation under §301.452(b) of the Nursing Practice Act regardless of whether such violation was influenced by chemical dependency, mental illness,

or diminished mental capacity. The Board will balance the need to protect the public and the need to ensure the nurse seeks treatment in determining whether the nurse is appropriate for participation in an approved peer assistance program.

(2) The program shall report to the board, in accordance with policies adopted by the board, a nurse reported to the program who is impaired or suspected of being impaired for chemical dependency, mental illness, or diminished mental capacity if the nurse was reported to the program by third party. A third party report is a report concerning a nurse suspected of chemical dependency, mental illness, or diminished mental capacity that comes to the attention of the program through any source other than a self report.

(c) General Criteria for Approved Peer Assistance Program.

(1) The program will provide statewide peer advocacy services to all nurses licensed to practice in Texas whose practice may be impaired by chemical dependency, certain mental illnesses, or diminished mental capacity.

(2) The program shall have a statewide monitoring system that will be able to track the nurse while preserving confidentiality.

(3) The program shall have a network of trained peer volunteer advocates located throughout the state.

(4) The program shall have a written plan for the education and training of volunteer advocates and other program personnel.

(5) The program shall have a written plan for the education of nurses, other practitioners, and employers.

(6) The program shall demonstrate financial stability and funding sufficient to operate the program.

(7) The program shall have a mechanism for documenting program compliance and for timely reporting of noncompliance to the board.

(8) The program shall be subject to periodic evaluation by the board or its designee in order for the board to evaluate the success of the program.

(d) Evaluation of Peer Assistance Program.

(1) The program shall collect and make available to the board and other appropriate persons data relating to program operations and participant outcomes. At a minimum, the program shall submit the following statistical information quarterly to the Board for the purpose of evaluating the success of the program:

(A) Number and source of referral;

(B) Number of individuals who sign participation agreements;

(C) Type of participation agreement signed, i.e., Extended Evaluation Program; substance abuse or dependency, dual diagnosis, mental illness;

(D) Number of cases referred to program by Board of Nursing (this number should include all third party referrals that are reported to the board, but remain in participation pending board review);

(E) Number of participants referred to program by Board order;

(F) Number of self referred cases closed and reason(s) for closure;

(G) Number of active cases;

(H) Number of participants employed in nursing;

(I) Number of participants completing program;

(J) Number of participants who are reported back for failing to comply with the participation agreement;

(K) Monitoring activities, including number of drug screens requested, conducted and results of these tests;

(L) All applicable performance measures required by the Legislative Budget Board.

(2) The program shall have a written plan for a systematic total program evaluation. Such plan shall include at a minimum monthly reports of the programs activities showing compliance with this rule, quarterly reports of applicable LBB performance measure data and an annual report of program activities.

(3) The program shall be subject to periodic evaluation by the board or its designee in order for the board to evaluate the success of the program.

(e) Participants entering the approved peer assistance program for chemical dependency or chemical abuse must agree to the following minimum conditions:

(1) The nurse shall undergo, as appropriate, a physical and/or psychosocial evaluation before entering the approved monitoring program. This evaluation will be performed by health care professional(s) with expertise in chemical dependency.

(2) The nurse shall enter into a contract with the approved peer assistance program to comply with the requirements of the program which shall include, but not be limited to:

(A) The nurse will undergo recommended substance abuse treatment by an appropriate treatment facility or provider.

(B) The nurse will agree to remain free of all mind-altering substances including alcohol except for medications prescribed by an authorized prescriber for legitimate medical purposes and approved by the program.

(C) The nurse must complete the prescribed aftercare, if any, which may include individual and/or group psychotherapy.

(D) The nurse will submit to random and "for cause" drug screening as specified by the approved monitoring program.

(E) The nurse will attend support groups as specified by the contract.

(F) The nurse will comply with specified employment conditions and restrictions as defined by the contract.

(G) The nurse shall sign a waiver allowing the approved peer assistance program to release, to the extend permitted by federal or state law, information to the Board if the nurse does not comply with the requirements of this contract.

(3) The nurse may be subject to disciplinary action by the Board if the nurse does not participate in the approved peer assistance program, does not comply with specified employment restrictions, or does not successfully complete the program.

(f) Referral to Board of Noncompliance with Peer Assistance Program.

(1) A participant may be terminated from the program for the following causes:

(A) Noncompliance with any aspect of the program agreement;

(B) Receipt of information by the board which, after investigation, results in disciplinary action by the board; or

(C) Being unable to practice according to acceptable and prevailing standards of safe nursing care.

(2) The program shall contact the board in accordance with board policies if a nurse under contract fails to comply with the terms of the program agreement or evidences conduct that indicates an inability or unwillingness to comply with the program.

(g) Eligibility for Program Participation.

(1) The program shall contact the board if it receives a third-party referral for a nurse who may have been impaired or suspected of being impaired and who may have failed to comply with the minimum standards of nursing (22 TAC §217.11) and/or committed an act constituting unprofessional conduct (22 TAC §217.12). The program shall send that report to the Board. The Board will balance the need to protect the public and the need to ensure the impaired nurse seeks treatment in determining the whether the nurse is appropriate for participation in an approved peer assistance program.

(2) An individual may not participate in the program if the information reviewed in conjunction with the report indicates to the board that the individual's compliance with the program may not be effectively monitored while participating in the program. This information includes, but is not limited to, the following:

(A) The individual is not currently licensed as a registered nurse or licensed vocational nurse;

(B) The individual is currently using or being prescribed a drug normally associated with chemical dependency or abuse;

(C) The individual has a medical and/or psychiatric condition, diagnosis, or disorder, other than chemical dependency, in which the manifest symptoms are not adequately controlled;

(D) The individual has attempted or completed two or more chemical dependency monitoring programs as of the date of the application, notwithstanding the individual's current chemical dependency treatment plan and related treatment currently submitted for purposes of program eligibility;

(E) The board has taken action against the individual's license to practice nursing as either a registered nurse or a licensed practical nurse in Texas within the last 5 years;

(F) The individual has been convicted of a felony, placed on probation or received deferred adjudication relating to a felony, or felony charges are currently pending, or is currently being investigated for a felony; or

(G) The individual has been convicted or registered as a sex offender.

(h) Successful Completion of the Program. A participant successfully completes the program when the participant fully complies with all of the terms of the program agreement for the period as specified in the agreement. When a participant successfully completes the program, the program shall notify the participant of the successful completion in writing. Once the participant receives this written notification of successful completion of the program, the participant shall no longer be required to comply with the program agreement. The program shall notify the board when a nurse who the board has ordered to attend or referred to the program successfully completes the peer assistance contract.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 29, 2008.

TRD-200800513
Katherine Thomas
Executive Director
Texas Board of Nursing
Effective date: February 18, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 305-6823

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PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 322. PRACTICE

22 TAC §322.1

The Texas Board of Physical Therapy Examiners adopts amendments to §322.1, Provision of Services, without changes to the proposed text as published in the December 21, 2007, issue of the *Texas Register* (32 TexReg 9518). The amendment will clarify for licensees and the public what kind of instruction may be given by physical therapists to individuals who are asymptomatic relating to the instruction being given.

The amendment adds language clarifying that instruction of individuals who are asymptomatic relating to the instruction being given includes the provision of information on health, wellness and fitness.

Comments were received from one individual, who believes the public may be confused rather than helped by the addition of written information regarding the use of the title "doctor" by a physical therapist in a clinical setting.

The amendment is adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 29, 2008.

TRD-200800515
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Effective date: February 18, 2008
Proposal publication date: December 21, 2007
For further information, please call: (512) 305-6900

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PART 34. TEXAS STATE BOARD OF SOCIAL WORKER EXAMINERS

CHAPTER 781. SOCIAL WORKER LICENSURE

The Texas State Board of Social Worker Examiners (board) adopts amendments to §§781.101, 781.102, 781.209, 781.215, 781.217, 781.301 - 781.304, 781.311, 781.314, 781.402 - 781.405, 781.409, 781.414, 781.502, 781.505, 781.509, 781.511, 781.512, 781.517, and 781.603; new §781.419, and the repeal of §781.609, concerning the licensure and regulation of social workers. The amendments to §§781.102, 781.303, and 781.402 are adopted with changes to the proposed text as published in the November 16, 2007, issue of the *Texas Register* (32 TexReg 8265). The amendments to §§781.101, 781.209, 781.215, 781.217, 781.301, 781.302, 781.304, 781.311, 781.314, 781.403 - 781.405, 781.409, 781.414, 781.502, 781.505, 781.509, 781.511, 781.512, 781.517; and 781.603; new §781.419; and the repeal of §781.609 are adopted without changes and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The adopted amendments, new rule, and repeal are necessary to implement Occupations Code, Chapter 505. The amended and new rules correct minor errors, improve the clarity of the rules, and ensure that the rules reflect current legal, policy, and operational considerations. Additionally, the repeal eliminates duplication of language.

SECTION-BY-SECTION SUMMARY

The amendments to §781.101 improve the description of the restriction in the Social Work Practice Act of the use of the social worker title.

The amendments to §781.102 improve the definitions of accredited university, Association of Social Work Boards, clinical social work, confidential information, detrimental to the client, direct practice, direct practice, dual relationship, exploitation, family systems, flagrant, fraud, full-time experience, group supervision, indirect practice, individual supervision, investigator, licensee, part-time experience, psychotherapy, social work practice, supportive counseling, supervision, telepractice, and termination; delete the definitions of exploitive behavior, pleading, reciprocity, sexual contact, and sexual exploitation; and, renumber the definitions accordingly.

The amendments to §781.209 clarify the types of committees that may be established by the board.

The amendments to §781.215 clarify what is displayed on the license certificate, add the requirements of a provisional license certificate, and reorder and renumber the section accordingly.

The amendments to §781.217 change the penalty fee for late renewal to one-fourth of the biennial license renewal fee (for late renewals from 1-90 days late); change the penalty fee for late renewal to one-half of the biennial license renewal fee (for late renewals from 91-365 days late); eliminate the student loan default reinstatement fee; and, renumber the section accordingly.

The amendments to §781.301 specify the academic requirements for licensure as a Licensed Clinical Social Worker to be consistent with the Occupations Code, §505; improve language, to establish a one time window between April 1, 2008 and March 31, 2010 during which LMSW licensees of the board may use clinical supervision which was on file with the board before the board established by rule change effective August 24, 2005 that clinical and non-clinical supervision expired after five years (After March 31, 2010, supervision toward clinical or non-clinical licensure or specialty recognition must have occurred within the previous five calendar years occurring from the date of application); remove the requirements of the advanced practice specialty recognition from subsection (a) and restore the requirements in subsection (b); add the requirements for independent non-clinical specialty recognition into subsection (b); remove language regarding the scope of practice in subsection (b) for placement in §781.402; remove language regarding the scope of practice in subsections (c), (d), and (e) for modification and placement in §781.402; and reorder and renumber the section accordingly.

The amendments to §781.302 remove provisions allowing licensees to obtain supervision toward licensure without a supervision plan; improve language, allow for a social worker to be under more than one supervision plan at the same time; and reorder and renumber the section accordingly.

The amendments to §781.303 improve language; delete language related to qualifications for independent practice recognition (note that the deleted language is added to §781.301); remove language in subsection (a) related to the application process for independent practice recognition; remove language in subsection (b) related to the initial one-time waive of the supervised experience requirement that expired August 31, 2007; remove language in subsection (f) that allowed for an LMSW or LBSW to practice independently until August 31, 2007; provide that an LMSW or LBSW may practice independently when the LMSW or LBSW holds the independent practice specialty recognition, is under application for the specialty recognition under the waiver of the supervised experience requirement, or when under a supervision plan for independent practice that has been approved by the board; and reorder and renumber the section accordingly.

Amendments to §781.304 improve language; specify that supervisors may supervise only supervisees providing professional services within the supervisor's own competency; establish the supervisor status renewal period is two years and to be renewed in conjunction with the license renewal; provide a process for a supervisor to surrender supervisory status; specify that any month of supervision under a supervision plan is not creditable unless the conditions of supervision specified in the section were met; forbid supervisors from providing supervision to a social worker who is practicing outside of the scope of the license; require a supervisor who believes a supervisee is practicing outside the scope of the license to make a report to the board; remove language that allows for supervision completed before the effective date of the chapter to be evaluated based on the rules that were in effect at the time the supervision plan or verification was submitted to the board; and reorder and renumber the section accordingly.

The amendment to §781.311 allows a temporarily licensed social worker who passes the licensing examination to be considered temporarily licensed until a regular license is issued by the board or the temporary license expires, whichever is first.

The amendments to §781.314 improve language and use updated terminology.

The amendments to §781.402 add language regarding the scope of practice removed from §781.301; to improve language;

to include Current Procedural Terminology (CPT) Codes among identified diagnostic classification systems in assessment, diagnosis, treatment and other social work practice activities Licensed Clinical Social Workers are qualified to use; specify that a LMSW may provide clinical social work services under a contract with an agency when under a board approved clinical supervision plan; remove definitions of independent non-clinical practice and independent clinical practice since the definitions already appear in §781.102; and reorder and renumber the section accordingly.

The amendments to §781.403 improve language and add a general standard of practice for social workers to ensure that the client or a legally authorized person representing the client has signed a consent for services, when appropriate.

The amendments to §781.404 add "services to be provided" to the list of items that a social worker shall make known to a prospective client.

The amendments to §781.405 add a definition of sexual exploitation and improve language.

The amendments to §781.409 improve language; clarify the requirement that a social worker provide a written explanation of types of treatment and charges on a bill or statement to a client even if the bill is paid by a third party; and remove language that indicated that a social worker would be responsible for services rendered when providing approval by signature by another individual who may or may not be licensed.

The amendments to §781.414 improve language and specify that the board will provide consumer information on its web site.

New §781.419 provides that a social worker who is licensed as a sex offender treatment provider by the Council on Sex Offender Treatment is not subject to disciplinary action by the board in relation to the social worker's provision of sex offender treatment; specify that a social worker who is a sex offender treatment provider and who acts in conformance with the rules, policies, and procedures of the council is not subject to any administrative sanction by the board; and specify that if the Council on Sex Offender Treatment takes disciplinary action against a social worker who is a sex offender treatment provider, the board may consider the final order imposing such disciplinary action as grounds for disciplinary action by the board.

The amendments to §781.502 rename the section; reflect that licenses are renewed for a two-year term; and delete language that provided for prorated fees during the transition from renewal terms of one year to two years.

The amendments to §781.505 improve language; use the current terms of "expire" and "expiration" as opposed to the terms "lapse" and "lapsed"; specify the current process for placing a license on inactive status; and specify the process to reactivate a license that was placed on inactive status.

The amendment to §781.509 improves language.

The amendments to §781.511 add the expiration date of a continuing education provider's approved status to certificates of completion issued by the provider and specify that a program offered for continuing education in ethics shall meet the minimum course requirements for an ethics course approved by the board.

The amendments to §781.512 improve language.

The amendment to §781.517 requires that supervisory training courses approved by the board before September 8, 2007, must meet the requirements in §781.511 by August 31, 2008.

The amendments to §781.603 clarify the functions in the complaint procedure that are preformed by department staff; remove the requirement that the executive director make a sworn statement in order to open an anonymous complaint; more accurately describe the review process and decisions made by the executive director upon the receipt of a complaint relative to referral for investigation and notification of the respondent to a complaint; update the complaint procedure; update the range of information provided to the board's ethics committee regarding the status of open complaints; update references to timelines; and reorder and renumber the section accordingly.

Section 781.609 is repealed because language in current board rule §781.703 provides for appropriate default procedures.

COMMENTS

The board has reviewed and prepared responses to the comments received regarding the proposed rules during the comment period. The commenters were one individual, associations, and/or groups, including the following: Licensees representing the National Association of Social Workers--Texas Chapter, the Texas Society of Clinical Social Work, and one licensee of the board. The commenters were not against the rules in their entirety; however, the commenters suggested recommendations for change as discussed in the summary of comments. Commenters were generally in favor of the rules.

Comment: Concerning §781.102(11) and §781.102(47), the commenter indicated agreement with the proposed changes to §781.102(11). The commenter stated that the definition of clinical social work could be improved by making it clear who is restricted from practicing clinical social work and recommended adding the phrase, "The practice of Clinical social work is restricted to either: (A) a Licensed Clinical Social Worker; or (B) a Licensed Master Social Worker under clinical supervision." The commenter noted that there is currently an insufficient and unworkable delineation between the definitions of clinical and non-clinical social work. The commenter recommended adding language to the definition of non-clinical social work (§781.102(47)) to include direct practice elements of non-clinical social work, such as counseling, case management, interviewing, assessment, intervention, mediation, problem solving, treatment and evaluation. Supportive counseling was not on the list because it defined as non-clinical.

Response: The board agreed with the comment and amended the definition in §781.102(11) accordingly. The board noted that §781.102(47) was not open to substantive change and, therefore, could not act on the recommended change. The board noted that this issue would be referred to the rules committee for consideration in a future rule discussion.

Comment: Concerning §781.102(22), the commenter stated that the definition of "direct practice" should be clarified to limit a "client" to an individual or group who perceives themselves to be (or who are reasonably perceived by others) as social services seekers or recipients. The commenter recommended adding the words, "with those seeking social services," to the end of the current definition.

Response: The board disagreed with the comment because the current definition is generally accepted by the board. No change was made as a result of this comment.

Comment: Concerning §781.102(57), the commenter stated that the definition of "social work practice" is defined by focusing on what social work practice is, not by whom it is provided or whether it is for compensation. The commenter recommended deleting the words, "as an employee, independent practitioner, consultant, or volunteer for compensation or pro bono."

Response: The board disagreed with the comment because it should be clear that social work practice by a licensee in all settings, including unpaid volunteer work is under the jurisdiction of the board. No change was made as a result of this comment.

Comment: Concerning §781.102(60)(B), the commenter stated that the addition of definitions of specific types of supervision is necessary and useful in determining the purpose of the activity. Subparagraph (B) distinguishes what clinical supervision will not be acceptable to the board. The commenter recommended adding to subparagraph (B) the words, "non-approved supervisor" and deleting the words, "Licensed Masters Social Worker providing clinical services by a Licensed Professional Counselor, Licensed Psychologist, Licensed Marriage and Family Therapist, Licensed Clinical Social Worker or Psychiatrist."

Response: The board disagreed with the comment because subparagraph (B) clarifies the specific license holders who are authorized to provide clinical supervision to an LMSW under which a LMSW may practice clinical social work, as authorized by the license, but the supervision is not creditable toward the supervised clinical experience requirement for licensure as a LCSW. No change was made as a result of this comment.

Comment: Concerning §781.102(60)(C), the commenter recommended adding the words, "as a Licensed Clinical Social Worker" to the end of subparagraph (C) to clarify the definition.

Response: The board agreed with the comment and made the change.

Comment: Concerning §781.102(60)(D), the commenter recommended the addition of the words, "in independent practice or as a Licensed Master Social Worker--Advanced Practice" to the end of subparagraph (D) to clarify the definition.

Response: The board agreed with the comment and made the change.

Comment: Concerning §781.102(61), the commenter stated that the general definition of a meeting between a supervisor and supervisee needs not to be so narrowly defined. Other sections of the rules give directions as to the specific time requirements for different types of supervision acceptable to the board. The commenter recommended changing the definition of "supervision hour" to "supervisory session" and provided language to revise the definition.

Response: The board disagreed with the comment because the definition of "supervision hour" is useful for licensee accruing hours of supervision toward the necessary 100 hours for eligibility to examine for the LCSW license. No change was made as a result of this comment.

Comment: Concerning §781.301(a)(3), the commenter stated that, to her knowledge, a specific social work degree in colleges and universities did not exist prior to 1971 and that students interested in a social work career prior to 1971 obtained a degree in "Sociology." The commenter recommended changing the academic requirement for licensure as a Licensed Baccalaureate Social Worker (LBSW) to include a degree in Sociology, if the degree was obtained prior to 1971.

Response: The board disagreed with the comment because the Occupations Code, §505.353(b)(2), specifies that the academic requirement for licensure as a Licensed Baccalaureate Social Worker (LBSW) is a "baccalaureate degree" in social work from an educational program accredited by the Council on Social Work Education. No change was made as a result of this comment.

Comment: Concerning §781.302(b), the commenter recommended changing the word "upgrade" to "change."

Response: The board disagreed with the comment because the "change" from the license of LMSW to LCSW is an upgrade since the license authorizes the additional scope of practice of clinical social work without supervision. No change was made as a result of this comment.

Comment: Concerning §781.302(e), (f), and (g), the commenter stated that the subsections do not address the heading and recommended placement of the subsections in §781.610.

Response: The board disagreed with the comment because the subsections are appropriately placed. No change was made as a result of this comment.

Comment: Concerning §781.303, the commenter referred to previous comments on §781.102 regarding the definitions of clinical and non-clinical social work and that if recommended changes were not adopted in regard to the definitions, then the "non-clinical" qualifier of independent practice recognition should be stricken in all instances. The commenter further recommended that the board include contract clinical services under appropriate supervision as within the scope of an LMSW who holds the independent practice recognition.

Response: The board disagreed with the comment because the non-clinical qualifier is a relevant distinction. As noted above, the board agreed that the definition of non-clinical social work should be considered for amendment in the future since it was not opened for change with this adoption. The board disagreed with the comment regarding including contract clinical supervision under appropriate supervision as within the scope of an LMSW who holds the independent practice recognition because an LMSW with appropriate supervision may provide contract clinical services only under a board approved clinical supervision plan under the supervision of a board approved supervisor. The holding of independent practice recognition is not relevant to the validity of the relationship. No change was made as a result of this comment.

Comment: Concerning §781.303(b) the commenter recommended inserting the phrase, "for recognition of independent practice," in the first line after the words "An individual providing supervision" as well as in the second sentence.

Response: The board agreed with the comment and appropriate changes were made.

Comment: Concerning §781.304(8), the commenter recommended that the board accept any combination of face-to-face and web cam sessions as appropriate for approval (toward supervision hours), given geographical constraints, technological advancements, and precedents set in educational institutions and other disciplines for web-cam instruction and telemedicine.

Response: The board disagreed with the comment because the current rules allow for the approval of non-face-to face sessions by request and subsequent evaluation by the board or the executive director. No change was made as a result of this comment.

Comment: Concerning §781.402(a), the commenter stated that a reasonable licensee or stakeholder may interpret the language of the scopes of practice as authorizing all licensees to practice every form of practice listed for each respective category of licensure. The commenter recommended changing the language from "includes" to "may include."

Response: The board agreed with the comment and made a change similar to that recommended by the commenter.

Comment: Concerning §781.402(c), the commenter stated that a reasonable licensee or stakeholder may interpret the language of the scopes of practice as authorizing all licensees to practice every form of practice listed for each respective category of licensure. The commenter recommended changing the language from "includes" to "may include."

The commenter also stated that the proposed inclusion of "diagnosis" to the scope of practice for a Licensed Master Social Worker should be deleted. The commenter noted that the Association of Social Work Board's model act does not include diagnosis in the scope of a LMSW; the overwhelming majority of other states do not include diagnosis in the scope of a LMSW/equivalent license (with IOWA being the only exception).

Response: The board agreed with the comment and removed "diagnosis" from the scope of practice for a LMSW in renumbered subsection (b) of the section.

Comment: Concerning §781.603, the commenter stated that the proposed changes to the section do not support due process and accountability in regard to the delineation of responsibilities for the executive director versus the Department of State Health Services.

Response: The board disagreed with the comment because the duties of the executive director should be separated from those of the department per Occupations Code, §505.155. No change was made as a result of this comment.

Commenters also commented on the following rules which were not proposed for change: §781.102(35) and §781.304(1)(E), (17), (18), and (19). The board could not consider revising rules as a result of the comments, but did agree to review the comments during a future review of rules.

BOARD COMMENTS

Board members commented that every reference to the use of the language "Licensed Masters Social Worker" should be changed to "Licensed Master Social Worker." The board agreed to the following changes to clarify intent and improve accuracy of the sections.

Change: All references to Licensed Masters Social Worker in §781.102(60)(B) - (E) were changed as recommended.

Board members commented that §781.402(b) and (c) should be reversed in order. The board agreed to the following changes to clarify intent and improve accuracy of the sections.

Change: The order of §781.402(b) and (c) were changed.

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §781.101, §781.102

STATUTORY AUTHORITY

The amendments are authorized by Occupations Code, §505.155, which requires the board to develop policies that clearly separate the policy-making responsibilities of the board and the management responsibilities of the executive director and staff of the department; by Occupations Code, §505.201, which authorizes the board to adopt rules necessary to perform the board's duties, to establish standards of conduct and ethics for license holders, to establish requirements for each type of license issued by the board, and to establish procedures for recognition of independent practice; by Occupations Code, §505.203, which authorizes the board to set fees; by Occupations Code, §505.254, which requires the board to adopt rules concerning an investigation of a complaint filed with the board; by Occupations Code, §505.303, which requires the board to establish a specialty area of clinical social work that is only available to a licensed master social worker who satisfies minimum supervised experience requirements and clinical examination as set by the board; and by Occupations Code, §505.404, which requires the board to establish mandatory continuing education requirements for license holders.

§781.102. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Accredited colleges or universities--An educational institution that is accredited by an accrediting agency recognized by the Council on Higher Education Accreditation.

(2) Act--The Social Work Practice Act, Occupations Code, Chapter 505.

(3) ALJ--A person within the State Office of Administrative Hearings who conducts hearings under this chapter on behalf of the board.

(4) Agency--A public or private employer, contractor or business entity providing social work services.

(5) AMEC--Alternative method of examining competency, as referenced in Occupations Code, §505.356(3).

(6) APA--The Administrative Procedure Act, Government Code, Chapter 2001.

(7) Association of Social Work Boards (ASWB)--The international organization which represents regulatory boards of social work and administers the national examinations utilized in the assessment for licensure.

(8) Board--Texas State Board of Social Worker Examiners.

(9) Case record--Any information related to a client and the services provided to that client, however recorded and stored.

(10) Client--An individual, family, couple, group or organization that seeks or receives social work services from a person identified as a social worker who is either licensed or unlicensed by the board. An individual, family, couple, group or organization remains a client until the formal termination of services.

(11) Clinical social work--A specialty within the practice of master social work that requires the application of social work theory, knowledge, methods, ethics, and the professional use of self to restore or enhance social, psychosocial, or biopsychosocial functioning of individuals, couples, families, groups, and/or persons who are adversely affected by social or psychosocial stress or health impairment. The practice of Clinical Social Work requires the application of specialized clinical knowledge and advanced clinical skills in the areas of assessment, diagnosis, and treatment of mental, emotional, and behavioral disorders, conditions and addictions, including severe mental illness in adults and serious emotional disturbances in adults, adolescents and children. Treatment methods include, but are not limited to, the

provision of individual, marital, couple, family, and group psychotherapy. Clinical social workers are qualified to use the Diagnostic and Statistical Manual of Mental Disorders (DSM), the International Classification of Diseases (ICD), Current Procedural Terminology (CPT) codes, and other diagnostic classification systems in assessment, diagnosis, and other practice activities. The practice of clinical social work is restricted to either:

(A) a Licensed Clinical Social Worker; or

(B) a Licensed Master Social Worker under clinical supervision.

(12) Confidential information--Individually identifiable information relating to a client, including the client's identity, and demographic information that relates to the past, present, or future physical or mental health or condition of a client; the provision of social work services to a client; the past, present, or future payment for the provision of social work services to a client; and identifies the client or with respect to which there is a reasonable basis to believe the information can be used to identify the client which is not discloseable under applicable law or court rules of evidence. Client information is "confidential" if it is intended to be disclosed to third persons to further the interest of the client in the diagnosis, examination, assessment, evaluation, or treatment, or those reasonably necessary for the transmission of the communication, or those who are participating in the diagnosis, examination, assessment, evaluation, or treatment under the direction of the social worker, including members of the client's family.

(13) Completed application--The official social work application form, fees and all supporting documentation which meets the criteria set out in this chapter.

(14) Conditions of exchange--The setting of rates of reimbursement or fee structure and business rules or policies involving issues such as cancellation of appointments, office hours, and management of insurance claims.

(15) Contested case--A proceeding in accordance with the APA and this chapter, including, but not limited to, rule enforcement and licensing, in which the legal rights, duties, or privileges of a party are to be determined by the board after an opportunity for an adjudicative hearing.

(16) Counseling--A method used by social workers to assist individuals, couples, families or groups in learning how to solve problems and make decisions about personal, health, social, educational, vocational, financial, and other interpersonal concerns.

(17) Consultation--To provide advice, opinions and to confer with other professionals regarding social work practice.

(18) Continuing education--Formal or informal education or trainings, which are oriented to maintain, improve or enhance social work practice.

(19) Council on Social Work Education (CSWE)--The national organization that accredits social work education schools and programs.

(20) Department--Department of State Health Services.

(21) Detrimental to the client--An act or omission by a social worker that damages the physical, mental, financial, or societal status of a client.

(22) Direct practice--The provision of social work services to clients in which goals are reached through personal contact and immediate influence.

(23) Dual relationship--Dual or multiple relationships occur when social workers interact with clients in more than one capacity, whether it be before, during or after the professional, social, or business relationship. Dual relationships can occur simultaneously or consecutively.

(24) Endorsement--The process whereby the board reviews requirements for licensure completed while under the jurisdiction of a different regulatory board from another state. The board may accept, deny or grant partial credit for requirements completed in a different jurisdiction.

(25) Examination--A standardized test or examination of social work knowledge, skills and abilities, which has been approved by the board.

(26) Exploitation--The use of a pattern, practice or scheme of conduct that can reasonably be construed as being primarily for the purposes of meeting the needs or being to the benefit of the licensee rather than in the best interest of the client or at the expense of another practitioner. An unequal balance is inherent in the client/social worker relationship. The use of this power imbalance for the personal benefit of the social worker at the expense of the client or another practitioner is exploitation. Exploitation may take financial, business, emotional, sexual, verbal, religious and/or relational forms.

(27) Family systems--An on-going self-regulating social system.

(28) Formal hearing--A hearing or proceeding in accordance with this chapter, including a contested case as defined in this section to address the issues of a contested case.

(29) Flagrant--Conspicuously inconsistent with what is right or proper as to appear to be a flouting of law or morality.

(30) Fraud--Any misrepresentation or omission by a social worker related to qualifications, services, or related activities or information.

(31) Full-time experience--Providing social work services thirty or more hours per week.

(32) Group supervision for licensure--Supervision provided to a minimum of two and no more than six supervisees in a designated supervision session.

(33) Health care professional--A licensee or any other person licensed, certified, or registered by the State of Texas in a health related profession.

(34) Home study--A formal written evaluation or social study to determine what is the best interest of a minor child or other dependent person.

(35) Independent clinical practice--The provision of clinical social work in independent practice in which the social worker assumes responsibility and accountability for the nature and quality of the services provided to clients, pro bono or in exchange for direct payment or third party reimbursement.

(36) Independent non-clinical practice--The practice of non-clinical social work outside the jurisdiction of an organizational setting, after completion of all applicable supervision requirements, in which the social worker assumes responsibility and accountability for the nature and quality of the services provided to clients, pro bono or in exchange for direct payment or third party reimbursement.

(37) Independent practice--The practice of social work services outside the jurisdiction of an organizational setting, after completion of all applicable supervision requirements, in which the social

worker assumes responsibility and accountability for the nature and quality of the services provided to clients, pro bono or in exchange for direct payment or third party reimbursement.

(38) Indirect practice--Providing social work services utilizing negotiation, education, advocacy, administration, research, policy development and resource location that does not have immediate or face-to-face contact with the clients being served.

(39) Individual supervision for licensure--Supervision provided to one supervisee during the designated supervision session.

(40) Investigator--An employee or contractor of the department utilized by the board in the investigation of allegations of professional misconduct.

(41) LBSW--Licensed Baccalaureate Social Worker.

(42) LCSW--Licensed Clinical Social Worker.

(43) License--A regular, provisional, or temporary license or recognition issued by the board unless the content of the rule indicates otherwise.

(44) Licensee--A person licensed by the board to practice social work.

(45) LMSW--Licensed Master Social Worker.

(46) LMSW-AP--Licensed master social worker-advanced practitioner.

(47) Non-clinical social work--The areas of social work practice that include community organization, planning, administration, teaching, research, administrative supervision, non-clinical consultation and other related social work activities.

(48) Part-time experience--Social work services provided for fewer than thirty hours per week.

(49) Party--Each person, governmental agency, or officer or employee of a governmental agency named by the ALJ as having a justiciable interest in the matter being considered, or any person, governmental agency, or officer or employee of a governmental agency meeting the requirements of a party as prescribed by applicable law.

(50) Persistently--Existing for a long or longer than usual time or continuously.

(51) Person--An individual, corporation, partnership, or other legal entity.

(52) Psychotherapy--Treatment utilizing a specialized, formal interaction with an individual, couple, family, or group by a social worker in which a therapeutic relationship is established, maintained and sustained to understand intrapersonal, interpersonal and psychosocial dynamics, and with a diagnosis and treatment of mental, emotional, and behavioral disorders, conditions and addictions.

(53) Recognition--Authorization from the board to engage in the independent or specialty practice of social work services.

(54) Rules--Provisions in this chapter specifying the implementation of statute and operations of the board and individuals affected by the Act.

(55) Social Work Case Management--The use of a biopsychosocial perspective to assess, evaluate, implement, monitor and advocate for services on behalf of and in collaboration with the identified client.

(56) Social worker--A person licensed under the Act.

(57) Social work practice--Services provided as an employee, independent practitioner, consultant, or volunteer for compensation or pro bono to effect changes in human behavior, a person's emotional responses, interpersonal relationships, and the social conditions of individuals, families, groups, organizations, and communities. The practice of social work is guided by specialized knowledge, acquired through formal social work education development and behavior within the context of the social environment, and methods to enhance the functioning of individuals, families, groups, communities, and social welfare organizations. Social work practice involves the disciplined application of social work values, principles, and methods, including, but not limited to, psychotherapy, marriage and family therapy, couples therapy, group therapy, mediation, case management, supervision of social work services and programs, counseling, assessment, diagnosis, treatment, and evaluation. Social work practice may also be referred to as social work services, social welfare policies and services, social welfare systems and resources, and human services.

(58) Supportive counseling--The methods used to help individuals create and maintain adaptive patterns. Such methods may include, but are not limited to, building community resources and networks, linking clients with services and resources, educating clients and informing the public, helping clients identify and build strengths, leading community groups, and providing reassurance and support. Supportive counseling is not considered clinical social work.

(59) Supervisor, board approved--A person meeting the requirements set out in §781.302 of this title (relating to Clinical Supervision for LCSW and Non-Clinical Supervision for LMSW-AP and Independent Practice Recognition), to supervise a licensee towards the LCSW, LMSW-AP or Independent Practice recognition.

(60) Supervision--Supervision includes:

(A) administrative or work related supervision of an employee, contractor or volunteer that is not related to qualification for licensure, practice recognition, a disciplinary order or a condition to new or continued licensure;

(B) clinical supervision of a Licensed Master Social Worker providing clinical services by a Licensed Professional Counselor, Licensed Psychologist, Licensed Marriage and Family Therapist, Licensed Clinical Social Worker or Psychiatrist that is not related to qualification for licensure, practice recognition, a disciplinary order or a condition to new or continued licensure;

(C) clinical supervision of a Licensed Master Social Worker providing clinical services by a Licensed Clinical Social Worker who is recognized by the board as a supervisor toward qualification for practice recognition as a Licensed Clinical Social Worker;

(D) non-clinical supervision of a Licensed Master Social Worker or Licensed Baccalaureate Social Worker providing non-clinical social work services by a licensed social worker who is recognized by the board as a supervisor toward qualification for practice recognition in independent practice or as a Licensed Master Social Worker;

(E) non-clinical supervision of a probationary Licensed Master Social Worker or Licensed Baccalaureate Social Worker providing clinical services by a licensed social worker who is recognized by the board as a supervisor toward licensure under the AMEC program; or

(F) supervision by an approved supervisor pursuant to a disciplinary order or as a condition of new or continued licensure.

(61) Supervision hour--A supervision hour is a minimum of 60 minutes in length.

(62) Telepractice--Providing social work services wherein the client and the practitioner are not in the same physical location.

(63) Termination--Ending social work services with a client.

(64) Texas Open Meetings Act--Government Code, Chapter 551.

(65) Texas Public Information Act--Government Code, Chapter 552.

(66) Waiver--The suspension of educational, professional, and/or examination requirements for applicants who meet the criteria for licensure under special conditions based on appeal to the board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800572
Jeannie McGuire, LBSW
Chair
Texas State Board of Social Worker Examiners
Effective date: February 21, 2008
Proposal publication date: November 16, 2007
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER B. THE BOARD

22 TAC §§781.209, 781.215, 781.217

STATUTORY AUTHORITY

The amendments are authorized by Occupations Code, §505.155, which requires the board to develop policies that clearly separate the policy-making responsibilities of the board and the management responsibilities of the executive director and staff of the department; by Occupations Code, §505.201, which authorizes the board to adopt rules necessary to perform the board's duties, to establish standards of conduct and ethics for license holders, to establish requirements for each type of license issued by the board, and to establish procedures for recognition of independent practice; by Occupations Code, §505.203, which authorizes the board to set fees; by Occupations Code, §505.254, which requires the board to adopt rules concerning an investigation of a complaint filed with the board; by Occupations Code, §505.303, which requires the board to establish a specialty area of clinical social work that is only available to a licensed master social worker who satisfies minimum supervised experience requirements and clinical examination as set by the board; and by Occupations Code, §505.404, which requires the board to establish mandatory continuing education requirements for license holders.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800573
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Effective date: February 21, 2008
Proposal publication date: November 16, 2007
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SUBCHAPTER C. LICENSES AND LICENSING PROCESS

22 TAC §§781.301 - 781.304, 781.311, 781.314

STATUTORY AUTHORITY

The amendments are authorized by Occupations Code, §505.155, which requires the board to develop policies that clearly separate the policy-making responsibilities of the board and the management responsibilities of the executive director and staff of the department; by Occupations Code, §505.201, which authorizes the board to adopt rules necessary to perform the board's duties, to establish standards of conduct and ethics for license holders, to establish requirements for each type of license issued by the board, and to establish procedures for recognition of independent practice; by Occupations Code, §505.203, which authorizes the board to set fees; by Occupations Code, §505.254, which requires the board to adopt rules concerning an investigation of a complaint filed with the board; by Occupations Code, §505.303, which requires the board to establish a specialty area of clinical social work that is only available to a licensed master social worker who satisfies minimum supervised experience requirements and clinical examination as set by the board; and by Occupations Code, §505.404, which requires the board to establish mandatory continuing education requirements for license holders.

§781.303. Independent Practice Recognition (Non-Clinical).

(a) A LBSW or LMSW who seeks to obtain board approval for the recognition of independent non-clinical practice shall meet requirements and parameters set by the board in §781.301 of this title (relating to Qualifications for Licensure).

(b) An individual providing supervision for the recognition of independent non-clinical practice to a LBSW shall be a LBSW recognized for independent non-clinical practice, LMSW recognized for independent non-clinical practice, LMSW-AP or LCSW. An individual providing supervision for the recognition of independent non-clinical practice to a LMSW shall be a LMSW recognized for independent non-clinical practice, LMSW-AP or LCSW. In addition to the required licensure, the supervisor shall be board-approved and have attained the recognition of independent practice.

(c) A person who has obtained only the temporary license may not begin the supervision process until the issuance of the regular license.

(d) The board may use the twenty common law factors developed by the Internal Revenue Service (IRS) as part of their determination process regarding whether a worker is an independent contractor or an employee.

(1) No instructions to accomplish a job.

(2) No training by the hiring company.

(3) Others can be hired by the independent contractor (subcontracting).

(4) Independent contractor's work is not essential to the company's success or continuation.

(5) No time clock.

(6) No permanent relationship between the contractor and company.

(7) Independent contractors control their own workers.

(8) Independent contractor should have enough time available to pursue other jobs.

(9) Independent contractor determines location of work.

(10) Independent contractor determines order of work.

(11) No interim reports.

(12) No hourly pay.

(13) Independent contractor often works for multiple firms.

(14) Independent contractor is often responsible for own business expenses.

(15) Own tools.

(16) Significant investment.

(17) Services available to the public by having an office and assistants; having business signs; having a business license; listing their services in a business directory; or advertising their services.

(18) Profit or loss possibilities.

(19) Can't be fired.

(20) No compensation if the job isn't done.

(e) A LBSW or LMSW who plans to apply for the recognition of non-clinical independent practice shall follow procedures set out in §781.302 of this title (relating to Clinical Supervision for LCSW and Non-Clinical Supervision for LMSW-AP and Independent Practice Recognition).

(f) A LBSW or LMSW may practice independently when the LMSW or LBSW holds the independent practice specialty recognition, is under application for the specialty recognition under the waiver of the supervised experience requirement, or when under a supervision plan for independent practice that has been approved by the board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800574
Jeannie McGuire, LBSW
Chair
Texas State Board of Social Worker Examiners
Effective date: February 21, 2008
Proposal publication date: November 16, 2007
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER D. CODE OF CONDUCT AND PROFESSIONAL STANDARDS OF PRACTICE

22 TAC §§781.402 - 781.405, 781.409, 781.414, 781.419

STATUTORY AUTHORITY

The amendments and new section are authorized by Occupations Code, §505.155, which requires the board to develop policies that clearly separate the policy-making responsibilities of the board and the management responsibilities of the executive director and staff of the department; by Occupations Code, §505.201, which authorizes the board to adopt rules necessary to perform the board's duties, to establish standards of conduct and ethics for license holders, to establish requirements for each type of license issued by the board, and to establish procedures for recognition of independent practice; by Occupations Code, §505.203, which authorizes the board to set fees; by Occupations Code, §505.254, which requires the board to adopt rules concerning an investigation of a complaint filed with the board; by Occupations Code, §505.303, which requires the board to establish a specialty area of clinical social work that is only available to a licensed master social worker who satisfies minimum supervised experience requirements and clinical examination as set by the board; and by Occupations Code, §505.404, which requires the board to establish mandatory continuing education requirements for license holders.

§781.402. The Practice of Social Work.

(a) Practice of Baccalaureate Social Work--The application of social work theory, knowledge, methods, ethics and the professional use of self to restore or enhance social, psychosocial, or biopsychosocial functioning of individuals, couples, families, groups, organizations and communities. Baccalaureate Social Work is generalist practice may include interviewing, assessment, planning, intervention, evaluation, case management, mediation, counseling, supportive counseling, direct practice, information and referral, problem solving, supervision, consultation, education, advocacy, community organization and the development, implementation, and administration of policies, programs and activities. A LBSW recognized for independent practice may provide any non-clinical baccalaureate social work services in either an employment or an independent practice setting. A LBSW recognized for independent practice may work under contract, bill directly for services, and bill third parties for reimbursements for services. A LBSW recognized for independent practice must restrict his or her independent practice to the provision of non-clinical social work services.

(b) Practice of Master's Social Work--The application of social work theory, knowledge, methods and ethics and the professional use of self to restore or enhance social, psychosocial, or biopsychosocial functioning of individuals, couples, families, groups, organizations and communities. The Practice of Master's Social Work may include the Practice of Clinical Social Work in an agency employment setting under clinical supervision. A LMSW may practice clinical social work under contract with an agency when under a board approved clinical supervision plan. Master's Social Work practice may include applying specialized knowledge and advanced practice skills in assessment, treatment, planning, implementation and evaluation, case management, mediation, counseling, supportive counseling, direct practice, information and referral, supervision, consultation, education, research, advocacy, community organization and developing, implementing and administering policies, programs and activities. The practice of Master's Social Work acknowledges the practitioners ability to engage in Baccalaureate Social Work practice.

(c) Practice of Clinical Social Work--The practice of social work that requires the application of social work theory, knowledge, methods, ethics, and the professional use of self to restore or enhance social, psychosocial, or biopsychosocial functioning of individuals, couples, families, groups, and/or persons who are adversely affected

by social or psychosocial stress or health impairment. The practice of Clinical Social Work requires applying specialized clinical knowledge and advanced clinical skills in assessment, diagnosis, and treatment of mental, emotional, and behavioral disorders, conditions and addictions, including severe mental illness in adults and serious emotional disturbances in children. The practice of Clinical Social Work acknowledges the practitioners ability to engage in Baccalaureate Social Work practice and Master's Social Work Practice. Treatment methods include but are not limited to providing individual, marital, couple, family, and group therapy mediation, counseling, supportive counseling, direct practice, and psychotherapy. Clinical social workers are qualified to use the Diagnostic and Statistical Manual of Mental Disorders (DSM), the International Classification of Diseases (ICD), Current Procedural Terminology (CPT) Codes, and other diagnostic classification systems in assessment, diagnosis, treatment and other practice activities. The practice of Clinical Social Work may include independent clinical practice and the provision of clinical supervision. A LCSW may provide any clinical or non-clinical social work services in either an employment or independent practice setting. A LCSW may work under contract, bill directly for services, and bill third parties for reimbursements for services. A LMSW recognized as an Advanced Practitioner (LMSW-AP) may provide any non-clinical social work services in either an employment or an independent practice setting. A LMSW-AP may work under contract, bill directly for services, and bill third parties for reimbursements for services. A LMSW recognized for independent practice may provide any non-clinical social work services in either an employment or an independent practice setting. A LMSW recognized for independent practice may work under contract, bill directly for services, and bill third parties for reimbursements for services. A LMSW recognized for independent practice and a LMSW-AP must restrict his or her independent practice to the provision of non-clinical social work services.

(d) A licensee who is not recognized for independent practice or working under supervision under the authority of a board approved non-clinical supervision plan must not engage in any independent practice that falls within the definition of social work practice in §781.102 of this title (relating to Definitions) without being licensed and recognized by the board unless the person is licensed in another profession and acting solely within the scope of that license. If engaged in professional practice under another license, the person may not use the titles "licensed clinical social worker," "licensed master social worker," "licensed social worker," "licensed baccalaureate social worker," or "social work associate" or any other title or initials that states or implies licensure or certification in social work unless one holds the appropriate license or independent practice recognition.

(e) An LBSW or LMSW who is not recognized for independent practice may not provide direct social work services to clients from a location that she or he owns or leases and that is not owned or leased by an employer or other legal entity with responsibility for the client. This does not preclude in home services such as in home health care or the use of telephones or other electronic media to provide services in an emergency.

(f) An LBSW or LMSW who is not recognized for independent practice may practice for remuneration in a direct employment or agency setting and can not work independently, bill directly to patients or to third party payers, unless the LBSW or LMSW is under a formal supervision plan approved by the board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800575
Jeannie McGuire, LBSW
Chair
Texas State Board of Social Worker Examiners
Effective date: February 21, 2008
Proposal publication date: November 16, 2007
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER E. LICENSE RENEWAL AND CONTINUING EDUCATION

22 TAC §§781.502, 781.505, 781.509, 781.511, 781.512, 781.517

STATUTORY AUTHORITY

The amendments are authorized by Occupations Code, §505.155, which requires the board to develop policies that clearly separate the policy-making responsibilities of the board and the management responsibilities of the executive director and staff of the department; by Occupations Code, §505.201, which authorizes the board to adopt rules necessary to perform the board's duties, to establish standards of conduct and ethics for license holders, to establish requirements for each type of license issued by the board, and to establish procedures for recognition of independent practice; by Occupations Code, §505.203, which authorizes the board to set fees; by Occupations Code, §505.254, which requires the board to adopt rules concerning an investigation of a complaint filed with the board; by Occupations Code, §505.303, which requires the board to establish a specialty area of clinical social work that is only available to a licensed master social worker who satisfies minimum supervised experience requirements and clinical examination as set by the board; and by Occupations Code, §505.404, which requires the board to establish mandatory continuing education requirements for license holders.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800576
Jeannie McGuire, LBSW
Chair
Texas State Board of Social Worker Examiners
Effective date: February 21, 2008
Proposal publication date: November 16, 2007
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER F. COMPLAINTS AND VIOLATIONS

22 TAC §781.603

STATUTORY AUTHORITY

The amendment is authorized by Occupations Code, §505.155, which requires the board to develop policies that clearly separate the policy-making responsibilities of the board and the management responsibilities of the executive director and staff of the department; by Occupations Code, §505.201, which authorizes the board to adopt rules necessary to perform the board's duties, to establish standards of conduct and ethics for license holders, to establish requirements for each type of license issued by the board, and to establish procedures for recognition of independent practice; by Occupations Code, §505.203, which authorizes the board to set fees; by Occupations Code, §505.254, which requires the board to adopt rules concerning an investigation of a complaint filed with the board; by Occupations Code, §505.303, which requires the board to establish a specialty area of clinical social work that is only available to a licensed master social worker who satisfies minimum supervised experience requirements and clinical examination as set by the board; and by Occupations Code, §505.404, which requires the board to establish mandatory continuing education requirements for license holders.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800577
Jeannie McGuire, LBSW
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Texas State Board of Social Worker Examiners
Effective date: February 21, 2008
Proposal publication date: November 16, 2007
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22 TAC §781.609

STATUTORY AUTHORITY

The repeal is authorized by Occupations Code, §505.155, which requires the board to develop policies that clearly separate the policy-making responsibilities of the board and the management responsibilities of the executive director and staff of the department; by Occupations Code, §505.201, which authorizes the board to adopt rules necessary to perform the board's duties, to establish standards of conduct and ethics for license holders, to establish requirements for each type of license issued by the board, and to establish procedures for recognition of independent practice; by Occupations Code, §505.203, which authorizes the board to set fees; by Occupations Code, §505.254, which requires the board to adopt rules concerning an investigation of a complaint filed with the board; by Occupations Code, §505.303, which requires the board to establish a specialty area of clinical social work that is only available to a licensed master social worker who satisfies minimum supervised experience requirements and clinical examination as set by the board; and by Occupations Code, §505.404, which requires the board to establish mandatory continuing education requirements for license holders.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800578
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Chair
Texas State Board of Social Worker Examiners
Effective date: February 21, 2008
Proposal publication date: November 16, 2007
For further information, please call: (512) 458-7111 x6972

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 114. CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES

SUBCHAPTER J. OPERATIONAL CONTROLS FOR MOTOR VEHICLES

DIVISION 2. LOCALLY ENFORCED MOTOR VEHICLE IDLING LIMITATIONS

30 TAC §114.512, §114.517

The Texas Commission on Environmental Quality (commission or TCEQ) adopts amendments to §114.512 and §114.517 *without changes* to the proposed text as published in the October 5, 2007, issue of the *Texas Register* (32 TexReg 6990) and will not be republished.

The amended sections will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Chapter 114, Subchapter J, Operational Controls for Motor Vehicles, Division 2, Locally Enforced Motor Vehicle Idling Limitations, was adopted on November 17, 2004, at the request of the local air quality planning organization in the Austin Early Action Compact (EAC) area (Bastrop, Caldwell, Hays, Travis, and Williamson Counties) for use as a control strategy in its EAC agreement to maintain attainment with the federal eight-hour ozone national ambient air quality standards (December 3, 2004, issue of the *Texas Register* (29 TexReg 11355)). The rule package also provided local governments in other areas of the state the option of applying these rules in their areas when additional control measures were needed to achieve or maintain attainment of the federal eight-hour ozone standard in the future.

The concept of an early, voluntary eight-hour air quality plan, or EAC was endorsed by EPA Region 6 in June 2002 then slightly modified and made available nationally in November 2002. A key point of an EAC is the flexibility afforded areas to select emission reduction measures such as limiting vehicle idling. On August 1, 2005, members of the Austin EAC and the commission signed the locally enforced idling restrictions memorandum of agreement (MOA). This MOA allowed participating counties to enforce the idling restriction rule in their jurisdictions. Members of the Austin EAC area signing the MOA included the counties

of Bastrop, Caldwell, Hays, Travis, and Williamson and the cities of Austin, Bastrop, Elgin, Georgetown, Hutto, Lockhart, Luling, Round Rock, and San Marcos.

In meetings with officials of the Austin EAC to develop the idling rule MOA, concerns arose regarding language in the locally enforced idling restrictions. Austin EAC members voiced concern that parts of §114.517, Exemptions, were ambiguous and needed revision. Members of the Austin EAC felt that §114.517(7) and (8) could be misinterpreted to mean that a transit vehicle could idle for a total of one hour. There was also concern that the commission's rule conflicted with Texas Department of Transportation (TxDOT) guidelines for vehicle idling by employees. Austin EAC members brought to the commission's attention TxDOT's policy regarding idling. The guidelines advise employees to idle their vehicles to operate the air conditioner or heating system for employee health and safety while they perform an essential job function related to roadway construction or maintenance. In many instances on-road and off-road vehicles at roadway construction sites must remain in idle mode during normal operations. The commission agreed with the Austin EAC members that the locally enforced idling restrictions should be revised in light of these concerns. At the request of the Austin EAC members, the commission adopted revisions to the locally enforced motor vehicle idling rule (May 12, 2006, issue of the *Texas Register* (31 TexReg 3900)).

In that same rulemaking, the commission also adopted revisions to the idling rule to conform to legislation passed in 2005. The 79th Legislature, 2005, passed House Bill (HB) 1540, amending Texas Health and Safety Code (THSC), Chapter 382, Subchapter B, §382.0191, Idling of Motor Vehicle While Using Sleeper Berth. The bill, stated that the "commission may not prohibit or limit the idling of a motor vehicle when idling is necessary to power a heater or air conditioner while a driver is using the vehicle's sleeper berth for a government-mandated rest period." In addition, the bill stated that, "no driver using the vehicle's sleeper berth may idle the vehicle in a school zone or within 1,000 feet of a public school during its hours of operation," or else be subject to a fine not to exceed $500.

This rulemaking amended the rule on idling limits for gasoline and diesel-powered engines in motor vehicles within the jurisdiction of any local government in the state that has signed an MOA with the commission to delegate enforcement to that local government. Local enforcement is crucial to the effective implementation of rules to reduce the extended idling of gasoline and diesel-powered heavy-duty vehicles and will help to ensure the reduction in nitrogen oxides (NO_x) and volatile organic compound (VOC) emissions, which is needed by local governments to achieve or maintain attainment of the federal eight-hour ozone standard. These idling limits will lower NO_x emissions and other pollutants from fuel combustion. Because NO_x is a precursor to ground-level ozone formation, reduced emissions of NO_x will result in ground-level ozone reductions.

In May 2007, the 80th Legislature passed Senate Bill (SB) 12, which in part amended THSC, §382.0191. The legislation further prohibited vehicle idling in residential areas as defined by Local Government Code, §244.001 and within 1,000 feet of hospitals. The legislation also prohibited vehicles with sleeper berths from idling if an electrification facility with external heat and air conditioning hook-ups is located within two miles of where they are stopped. SB 12 extended the expiration of prohibitions on the commission from adopting rules restricting certain idling activities from September 1, 2007, to September 1, 2009.

Currently, there are no federal regulations governing idle time for motor vehicles. The requirements developed by the commission for this NO_x emission reduction strategy will result in restrictions on the time allowed for motor vehicle idling.

SECTION BY SECTION DISCUSSION

§114.512, Control Requirements for Motor Vehicle Idling

The adopted amendment to §114.512(b), Control Requirements for Motor Vehicle Idling, prohibits idling by drivers using the vehicle's sleeper berth in residential areas as defined by Local Government Code, §244.001, or within 1,000 feet of a hospital. Additionally, the expiration of this subsection will be changed from September 1, 2007, to September 1, 2009.

§114.517, Exemptions

The adopted amendment to §114.517(1), Exemptions, will change the expiration date of these paragraphs from September 1, 2007, to September 1, 2009. Adopted §114.57(2) has been added to clarify that after September 1, 2009, vehicles with Gross Vehicle Weight Rating (GVWR) of 14,000 pounds or less will no longer be exempt from the requirements of §114.512. The current exemptions listed as paragraphs (2) - (11) of this section are renumbered as paragraphs (3) - (12) for consistency. Renumbered §114.517(12) is amended by changing the expiration date of the paragraph from September 1, 2007, to September 1, 2009. The adopted amendment to §114.517(11) will also prohibit idling to power a heater or air conditioner if the vehicle is within two miles of a facility offering external heating and air conditioning connections at a time when those connections are available.

The amendments to §114.512 and §114.517 are adopted to ensure that the rules are consistent with the requirements set forth in SB 12.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rules are not subject to §2001.0225 because although the adoption meets the definition of a "major environmental rule" as defined the statute, it does not meet any of the four applicability requirements listed in §2001.0225(a).

The regulatory analysis requirements of Texas Government Code, §2001.0225 only apply to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the commission instead of under a specific state law. Specifically, the adoption will amend the rules that limit heavy-duty motor vehicle idling with the jurisdiction of any local government in the state that has signed an MOA with the commission to delegate enforcement to that local government. The adopted amendments will implement changes to THSC, §382.0191 as a result of passage of SB 12 in the 80th Legislature, 2007. The legislation further prohibited vehicle idling in residential areas and within 1,000 feet of hospitals. The legislation also prohibited vehicles with sleeper berths from idling if an electrification facility with external heat and air conditioning hook-ups is located within two miles of where they

are stopped. SB 12 extended the expiration of prohibitions on the commission from adopting rules restricting certain idling activities from September 1, 2007, to September 1, 2009. Currently, there are no federal regulations governing idle time for motor vehicles. These adoptions therefore do not exceed an express requirement of federal law. The amendments are needed to implement state law but do not exceed those new requirements. The adopted rules do involve a compact (in particular, the Austin EAC), which is an agreement between the state and federal government to implement a state and federal program, however, the adopted amendments do not exceed the requirements of that compact. Finally, this adopted rulemaking was not developed solely under the general powers of the commission, but is authorized by specific sections of THSC, Chapter 382, which are cited in the STATUTORY AUTHORITY section of this preamble, including §382.012 and §382.0191. Because this rulemaking does not meet any of the four applicability requirements, Texas Government Code, §2001.0225(b) does not apply, and a regulatory impact analysis is not required.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period, but did not receive any comments during the public comment period.

TAKINGS IMPACT ASSESSMENT

Under Texas Government Code, §2007.002(5), "taking" means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact assessment for the adopted rules. Promulgation and enforcement of the rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The adopted rules will not affect private real property in a manner that restricts or limit an owner's right to the property that would otherwise exist in the absence of the government action. Therefore, the adopted rules will not cause a "taking" as defined under, Texas Government Code, §2007.002(5).

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking action and found that the adoption is an action identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, that will affect an action/authorization identified in §505.11, and therefore will require that applicable goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission determined that under 31 TAC §505.22, the adopted rulemaking action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). No new sources of air contaminants will be authorized and ozone levels will be reduced as a result of the adopted rulemaking. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 Code of Federal Regulations, to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 Code of Federal Regulations. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period, but did not receive any comments during the public comment period.

PUBLIC COMMENT

The public hearing on this adoption was held in Austin on October 22, 2007, at 10:00 a.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building F, Room 2210.

The City of Dallas submitted written comments in support of the rulemaking. One individual submitted a written comment not directly related to the idling rulemaking.

RESPONSE TO COMMENTS

Support of Rule

The City of Dallas commented that the city is in support of all changes proposed to Chapter 114 because they are of great importance in the effort to improve air quality.

The commission appreciates the support for the changes in this rule. No changes were made as a result of this comment.

Year Round Idling Restrictions Comment

The City of Dallas commented that they are in support of year-round idling restrictions and asked if the effective period could be moved from during ozone season to year-round.

The commission acknowledges the request to implement year round idling restrictions. This particular rulemaking is limited to implementation of changes found in SB 12. The commission did not propose to change the idling season to year-round. No changes to the idling restriction season were made as a result of this comment. The idling limitations will remain, as they currently exist for consistency with the SIP.

Non-Idling Rule Comments

An individual commented in favor of ending the oxygenation fuel program in the El Paso area.

The commission appreciates the commenter's interest in air quality. The comments do not relate to the proposed idling restriction amendments and no changes have to the rule have been made in response to them.

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC, and under Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and

purposes of the TCAA. The amendments are adopted under TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.019, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles; §382.0191, which authorizes use of a sleeping berth for a government-mandated rest period; and §382.208, which authorizes the commission to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles. The adopted amendments implement TWC, §5.103, THSC, §§382.002, 382.011, 382.012, 382.017, 382.019, 382.0191, and 382.208, and SB 12, Article 4, 80th Legislature, 2007.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800613
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: February 21, 2008
Proposal publication date: October 5, 2007
For further information, please call: (512) 239-6091

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 355. RESEARCH AND PLANNING FUND

The Texas Water Development Board (board) adopts the following Chapter 355 rules, regarding the Research and Planning Fund, as published in the November 16, 2007, issue of the *Texas Register* (32 TexReg 8286). Sections 355.3, 355.10, 355.71, 355.77, 355.92, 355.93, 355.97, 355.100, and 355.110 - 355.115 are adopted without changes and will not be republished. Sections 355.5, 355.11 and 355.72 are adopted with changes and will be republished.

The amendments to §§355.3, 355.5, 355.10, and 355.11, Subchapter A, General Research and Planning, are adopted under the authority of Texas Water Code §15.403 which requires the board to adopt rules to carry out Texas Water Code, Chapter 15.

The amendments to §§355.71, 355.72, and 355.77, Subchapter B, Economically Distressed Areas Facility Engineering, are adopted under the authority of Texas Water Code §15.407(d) relating to rules governing the procurement of facility engineering services by a political subdivision and other rules as necessary to carry out Texas Water Code, Chapter 15, Subchapter F.

The amendments to §§355.92, 355.93, 355.97, and 355.100, Subchapter C, Regional Water Planning Grants, are adopted under the authority of Texas Water Code §15.403, which directs the board to adopt rules to carry out Texas Water Code, Chapter 15, under which the board provides the funding for regional water plans; and Texas Water Code §15.4061, which requires the board to adopt rules establishing criteria for eligibility for regional water planning money.

New §§355.110 - 355.115, Subchapter D, Environmental Flows Grants, are adopted pursuant to Texas Water Code §15.403 which authorizes the board to adopt rules for Texas Water Code, Chapter 15, relating to the Texas Water Assistance Program for research and planning, and §15.4063 which authorizes the board to provide funds relating to activities for studying environmental flows.

The board received no comments on the proposed rules.

SUBCHAPTER A. GENERAL RESEARCH AND PLANNING

31 TAC §§355.3, 355.5, 355.10, 355.11

The amendments to §§355.3, 355.5, 355.10 and 355.11 concerning Subchapter A, General Research and Planning, are adopted under the authority of Texas Water Code §15.403 which requires the board to adopt rules to carry out Water Code Chapter 15.

The code affected by this rulemaking is Water Code, Chapter 15, Subchapter F relating to Research and Planning; and Chapter 16, Subchapter C relating to Planning.

§355.5. Criteria.

Applications will be evaluated by the executive administrator, considering, at a minimum, the following criteria:

(1) Research project evaluation criteria for unsolicited applications:

(A) relationship of project to current needs for water resource research;

(B) description of the proposed research project;

(C) approach to organizing and managing the research project;

(D) estimated time required to complete the research project;

(E) ability to perform the research and complete the project;

(F) potential economic impact; and

(G) environmental enhancement and conservation impact.

(2) Research project evaluation criteria for solicited applications:

(A) description of the proposed research project;

(B) responsiveness of the application to the request for proposals for requests for qualifications;

(C) approach to organizing and managing the research project;

(D) estimated time required to complete the research project; and

(E) ability to perform the research and complete the project.

(3) Flood control planning project criteria:

(A) degree to which proposed planning duplicates previous or ongoing flood plans;

(B) project service area is regional versus local;

(C) history of flooding in project area;

(D) participation in National Flood Insurance Program;

(E) project organization and budget; and

(F) scope and potential benefits of project.

(4) Regional facility planning project criteria:

(A) degree to which proposed planning duplicates previous or ongoing plans;

(B) regional nature of project;

(C) conformance to certified water quality management plans;

(D) adequacy of water conservation plan and commitment to water conservation;

(E) project organization and budget;

(F) scope and potential benefits of project;

(G) the degree to which the regional facility planning is consistent with an approved regional water plan for the area in which the political subdivision is located.

§355.11. Availability of Reports and Planning Documents.

All reports, planning documents and any other work products resulting from projects receiving board funding assistance must be made available to state agencies and political subdivisions as required by the executive administrator or as agreed to by the contracting parties.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 29, 2008.

TRD-200800469
Jim Bateman
Staff Attorney
Texas Water Development Board
Effective date: February 18, 2008
Proposal publication date: November 16, 2007
For further information, please call: (512) 463-4946

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SUBCHAPTER B. ECONOMICALLY DISTRESSED AREAS FACILITY ENGINEERING

31 TAC §§355.71, 355.72, 355.77

The amendments to §§355.71, 355.72, and 355.77 concerning Subchapter B, Economically Distressed Areas Facility Engineering are adopted under the authority of the Texas Water Code §15.407(d) relating to rules governing the procurement of facility engineering services by a political subdivision and other rules as necessary to carry out subchapter F of Chapter 15 of the Water Code.

The code affected by this rulemaking is Water Code, Chapter 15, Subchapter F relating to Research and Planning; and Chapter 16, Subchapter C relating to Planning.

§355.72. Criteria for Eligibility.

(a) Political subdivisions must meet the appropriate requirements of this section before the board may consider an application for financial assistance for facility planning.

(1) A county within which the political subdivision applying for assistance is wholly or partially located must have adopted the model subdivision rules required by the Texas Water Code, §16.343. Copies of the model subdivision rules are available upon request from the Texas Water Development Board, Office of General Counsel, P.O. Box 13231, Austin, Texas 78711 or the board's web site http://www.twdb.state.tx.us/publications/rules/rules.asp.

(2) A municipality which applies for financial assistance or within which a political subdivision applying for assistance is wholly or partially located must have adopted the model subdivision rules required by the Texas Water Code, §16.343, if the economically distressed area to be served is partially or wholly located within the incorporated limits of the municipality.

(3) A political subdivision applying for facility planning assistance must provide a citation to the specific legal authority in the Texas Constitution and statutes pursuant to which the applicant is authorized to provide the service for which the applicant is receiving financial assistance as well as citation to the laws under which the political subdivision was created and is operating.

(4) A political subdivision shall have submitted for review:

(A) an annual audit for the most recent fiscal year of the political subdivision and financial statements for the three previous complete months;

(B) the most recent order or resolution establishing the rates and charges for the utility service for which the planning will be performed;

(C) the current capital improvement plan for the utility service for which the planning will be performed;

(D) an executed contract with the consulting engineer to prepare the facility plan and sufficient documentation to establish that the political subdivision complied with §355.77 of this title in procuring the services of the consulting engineer.

(b) If the applicant is a local governmental entity as defined in the Health and Safety Code, Chapter 366, then before the board provides financial assistance for facility planning, the applicant must provide satisfactory evidence that it has taken and will take all actions necessary to receive and maintain a designation as an authorized agent of the commission as set forth in that chapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 29, 2008.

TRD-200800470

Jim Bateman
Staff Attorney
Texas Water Development Board
Effective date: February 18, 2008
Proposal publication date: November 16, 2007
For further information, please call: (512) 463-4946

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SUBCHAPTER C. REGIONAL WATER PLANNING GRANTS

31 TAC §§355.92, 355.93, 355.97, 355.100

The amendments to §§355.92, 355.93, 355.97, and 355.100 concerning Subchapter C, Regional Water Planning Grants, are adopted under the authority of Texas Water Code §15.403, which directs the board to adopt rules to carry out Texas Water Code, Chapter 15, under which the board provides the funding for regional water plans; and Texas Water Code §15.4061, which requires the board to adopt rules establishing criteria for eligibility for regional water planning money.

The code affected by this rulemaking is Water Code, Chapter 15, Subchapter F relating to Research and Planning; and Chapter 16, Subchapter C relating to Planning.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 29, 2008.

TRD-200800471
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Staff Attorney
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Effective date: February 18, 2008
Proposal publication date: November 16, 2007
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SUBCHAPTER D. ENVIRONMENTAL FLOWS GRANTS

31 TAC §§355.110 - 355.115

New Subchapter D relating to funds for environmental flows committees, teams and contracts is adopted pursuant to Water Code §15.403 which authorizes the board to adopt rules for Water Code Chapter 15 relating to the Texas Water Assistance Program for research and planning and §15.4063 which authorizes the board to provide funds relating to activities for studying environmental flows.

The code affected by this rulemaking is Water Code, Chapter 15, Subchapter F relating to Research and Planning; and Chapter 16, Subchapter C relating to Planning.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 29, 2008.

TRD-200800472
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Staff Attorney
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Effective date: February 18, 2008
Proposal publication date: November 16, 2007
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CHAPTER 357. REGIONAL WATER PLANNING GUIDELINES

31 TAC §§357.5, 357.7, 357.10, 357.12, 357.16

The Texas Water Development Board (board) adopts §§357.5, 357.10, 357.12 and 357.16 without changes from the proposed text and these sections will not be republished. The board adopts §357.7 with changes to the proposed text. The proposed rulemakings were published in the November 16, 2007, issue of the *Texas Register* (32 TexReg 8293).

§357.5

The board adopts §357.5 without changes to the proposed text. The board received no comments on this section.

§357.7

The board adopts §357.7 with changes as noted below.

§357.7(a)(3)(A)

The board adopts §357.7(a)(3)(A) relating to regional water plan development without changes to the proposed text based on the comments described herein. Two commenters recommended that the board add the words "prudent storage reserve" to the definition of firm yield in proposed §357.7(a)(3)(A). The board is not making the requested change. The board requires a consistent definition to analyze water supplies under drought conditions on a statewide basis. The board notes that the concept of prudent storage reserve may be utilized by regional water planning groups (RWPG) in addition to firm yield as defined in proposed §357.7(a)(3)(A) pursuant to §357.7(a)(3)(B) and in analyzing their management strategies pursuant to §357.7(a)(7).

One commenter recommended that RWPGs be permitted to continue using analyses that were used with written approval in past. The board is not making changes based on this comment because effective statewide water planning depends upon use of the same metrics throughout the state and any deviations in analyses must be based on current science and adequately documented. Allowing each entity to use a different methodology without reviewing the most current science or other changed conditions and documenting any variations in the methodology will not result in effective or efficient water planning.

One commenter requested that the board allow the use of the "most appropriate" methodology for calculating water supply noting that each drought reduces firm yield. The board is not making the requested change because of the need for consistent analyses, as discussed above, and because regional water planning groups (RWPG) can use other methodologies in addition to firm yield as defined in proposed §357.7(a)(3)(A) pursuant to §357.7(a)(3)(B) and in analyzing their management strategies pursuant to §357.7(a)(7).

One commenter requested that the calculation of water supply include the assumption that senior water rights will be used. The rule, as proposed, provides that analysis of existing water supply includes the assumption that all senior water rights will be used. Therefore, no change is made based on this comment.

Two commenters requested that the calculation of water supply be allowed "on any reasonable basis appropriate." The board disagrees and is not making a change based on this comment. Allowing each RWPG to use a methodology they deem appropriate could easily result in numerous methodologies that could not be adequately compared or provide the board with a consistent definition to analyze water supplies under drought conditions on a statewide basis. One of these commenters noted that use of the safe yield method would provide better protection in future droughts in West Texas. The board appreciates the distinctions among different geographic areas but, the calculation of supply must be consistent statewide. The safe yield method may be utilized in addition to firm yield upon written approval and in developing management strategies.

Two commenters requested deletion of the phrase "drought of record" which they deemed not helpful for gauging future extent or duration. The board declines to make a change based on these comments because the statute, Water Code §16.053(e)(4) requires regional water plans (RWP) that identify water management strategies to be used during a drought of record. The proposed language of §357.7(a)(3) requires evaluation of supplies available for use during a drought of record. The need to analyze supply during a drought of record is consistent with the statutory command to create a management strategy for drought of record.

Two commenters requested that the board allow use of other measure for calculating water supply without approval of the board's executive administrator. The board is not making a change based on these comments because effective statewide water planning depends upon use of the same metrics throughout the state and any deviations in analyses must be based on current science and adequately documented. Allowing each entity to use a different methodology without reviewing the most current science or other changed conditions and documenting any variations in the methodology will not result in effective or efficient water planning.

§357.7(a)(3)(B)

The board adopts §357.7(a)(3)(B) relating to regional water plan development with changes to the proposed text based on comments described herein. Two commenters suggested that the definition of firm yield be deleted from this subsection because it is defined in §357.7(a)(3)(A). The proposed rule deleted the last sentence of §357.7(a)(3)(B); however, in response to the comment, the board adopts §357.7(a)(3)(B) with changes to the proposed text by deleting all of the text except the first sentence. This change avoids confusion by eliminating language duplicative of that in §357.7(a)(3)(A) and does not limit additional analyses that can be approved in writing by the executive administrator.

Three commenters recommended that §357.7(a)(3)(B) allow system yield from operations as a measure of water supply. The proposed rule specifically requires firm yield and allows use of operational procedures only upon approval of the executive administrator. The board makes no change based upon this comment because the executive administrator may approve other analyses.

One commenter asked that the board allow the use of system yield from operations if the Texas Commission on Environmental Quality approves such usage. The board makes no change based on this comment because use of a different methodology without reviewing the most current science or other changed conditions and documenting any variations in the methodology will not result in effective or efficient water planning.

One commenter requested that the board allow the use of previously approved analyses. The board is not making any change based upon this comment; the point of the rule proposal was to effect consistency in the method used for evaluating water supply and because use of a different methodology without reviewing the most current science or other changed conditions and documenting any variations in the methodology will not result in effective or efficient water planning.

One commenter requested that the last sentence of the section be reworded to include the phrase "or system of reservoirs." However the last sentence of §357.7(a)(3)(B), a definition of firm yield was proposed for deletion because "firm yield" is defined in §357.7(a)(3)(A) as proposed. Therefore the board makes no changes based on this comment.

§357.7(a)(3)(C)

The board adopts §357.7(a)(3)(C) relating to regional water plan development with changes to the proposed text based on comments as discussed herein. One commenter noted that allowing "better site specific information" was a good idea and should be retained in the final rule. The board is revising the language to allow use of modifications to the WAM with the approval of the executive administrator. The use of "better site specific information" will likely constitute a modification to the WAM, requiring the approval of the executive administrator.

Two commenters requested that the board allow entities to use the same methodology and models they used in the past. The board disagrees with this request because the purpose of the proposed rule is to require the use of the same models statewide.

One commenter commented that the board should allow entities to assume full system use and no return flows with the WAM. The board agrees with this comment and is adopting §357.7(a)(3)(C) with additional language requiring use of these assumptions. This commenter agreed that executive administrator approval is appropriate for deviations from the WAM. The board is adding the requirement that deviations from the TCEQ WAM must be approved by the executive administrator.

One commenter asked that the board allow the use of modified WAM. The board agrees that there may be situations where modifications constitute improvements and therefore is adopting the rule with changes by adding language that allows modification of the WAM upon approval of the executive administrator.

One commenter stated that requiring the use of WAM was a good concept and should be retained in the rule. The board is retaining the required use of the WAMs in the rule.

One commenter stated that the board should allow the use of basin specific versions of the WAM. The board is making a change based on this comment by allowing the use of modified WAMs with the prior approval of the executive administrator.

One commenter suggested that analysis of both water supply and water management strategies should consider treated effluent. The board is not making any change based on this comment because the manner in which planning groups should consider

treated effluent is still under review and is the subject of debate throughout the state. The board is awaiting further study and review of the topic of treated effluent prior to changing planning rules based on the use of treated effluent.

§357.7(a)(7)(H)

The board adopts §357.7(a)(7)(H) relating to regional water plan development with changes to the proposed text. One commenter asked whether the 125% limit on recognized need applies at the end of the fifty year planning period or to the firm supply of recommended strategy. The 125% limit applies to the water user group's need met by the original recommended strategy. Both the original and the substituted strategy are limited to no more than 125% of the water user group's need. No change is being made based on this comment.

Two commenters requested that the 125% limit be deleted. The board is not making a change based on this comment because the 125% rule serves the important purpose of providing for orderly and efficient planning. The board is retaining the 125% limit to ensure appropriate planning that does not excessively exceed identified needs.

One commenter recommended that the board allow each RWPG to make its own decision about the 125% limit. The board disagrees with this comment because allowing each regional group to make a different decision may result in inefficient planning.

Two commenters suggested that the 125% limit apply only to supplies that are greater than 10,000 ac-ft/yr. The board is not making a change based on this comment because there is no rational basis for applying the rule to some, but not all, water management strategies.

Two commenters requested that the board allow substitution of more than one evaluated strategy if required for flexibility in planning. The board agrees with these commenters and adopts §357.7(a)(7)(H) with changes to the proposed text.

One commenter asked that the board adopt the subsection with the words "not recommended" substituted for no longer feasible." This comment was made in response to proposed §357.7(a)(8)(H), which is being deleted in response to comments, as discussed herein. The board agrees with this commenter and adopts §357.7(a)(7)(H) with the words "not recommended" instead of "not feasible."

§357.7(a)(8)(H)

The board is adopting §357.7(a)(8)(H) relating to regional water plan development with changes to the proposed text. One commenter recommended deleting this section because it contains an erroneous reference to §357.7(a)(1)(M) by stating that section refers to pipelines; however §357.7(a)(1)(M) refers to water loss audits performed by retail public utilities. The board agrees with the commenter and is deleting the reference to §357.7(a)(1)(M), but the board is retaining the directive to consider water conveyance facilities when evaluating water management strategies.

§357.7(a)(8)(I)

The board adopts §357.7(a)(8)(I) with changes to the proposed text by deleting this subsection. Two commenters questioned whether this section, which appears to repeat §357.7(a)(7)(H) is necessary or correctly integrated into rule. The board appreciates the comment and acknowledges that the rule is repetitive. The board adopts the rule with changes to the proposed text by deleting this subsection.

One commenter noted the language of this subsection and §357.7(a)(8)(I) should be retained in the adopted rule. The board disagrees and the board is deleting §357.7(a)(8)(I) because it is repetitive and creates confusion.

Two commenters stated that the 125% is too restrictive and should be deleted. One commenter requested that the 125% limit be deleted. Two commenters asked that the requirement to obtain executive administrator approval be deleted. As discussed in previous paragraphs, the limit on planning in excess of 125% of the identified needs is being retained in §357.7(a)(7)(H), as is the requirement for executive administrator approval for any deviations from the 125% limit.

Two commenters stated that the board should allow an amount of supply greater than 125% of anticipated need in cases where the substituted strategy and the original strategy are both greater than the 125% limit. The board agrees with this comment with a caveat. The board adopts §357.7(a)(7)(H) with language that allows substitution of a strategy in excess of 125% of anticipated need only if the substituted strategy does not allow for planning in excess of either 125% of the identified need or upon written approval of the executive administrator.

§357.10

The board adopts §357.10 without changes to the proposed text. The board received no comments on this section.

§357.12

The board adopts §357.12 relating to Notice and Public Participation without changes to the proposed text.

One commenter requested that the language of §357.12(a)(6)(D) clarify that the reference to 30 days refers to 30 days after the public hearing. The board is not making the requested change because subparagraph (D) already references the hearings required in paragraphs (3) and (4) which clearly relate to public hearings.

One commenter noted that §357.12(a)(4) should be changed because it does not address the minor amendment comment period. The board is not making a change based on this comment because adopted §357.16(d) describes the public meeting related to a minor amendment.

One commenter requested changes to proposed §357.12(a)(6)(D) so that it would be consistent with proposed §357.16 relating to Minor Amendments to the Regional Water Plan. The board is not making a change based on this comment because the ordinary amendment process for which public participation is required pursuant to the Texas Administrative Procedure Act and for which public participation is described in proposed §357.12(a)(6) are not affected by proposed §357.16, which relates only to minor amendments.

§357.16

The board adopts §357.16 relating to Minor Amendments and Clean Coal Project Amendments to Regional Water Plans and State Water Plan without changes to the proposed text. Two commenters recommended that the rule should allow, as a minor amendment, any change that was previously evaluated and included in an approved RWP. The board disagrees with this comment and is not making the recommended changes. Matters that were relevant to past approved RWPs are not necessarily minor and the board does not want to allow significant changes under the guise of minor amendments.

The following entities opposed the proposed rules. Brazos River Authority; Coastal Bend Regional Water Planning Group; Freese and Nichols, Inc.; Lloyd Gosselink; Palo Pinto County Municipal Water District No. 1; Region C Water Planning Group; Region G Water Planning Group; Region L Water Planning Group and the San Antonio River Authority.

These rules are adopted pursuant to Water Code §16.053(f)(1) and (2) which requires the board to adopt rules to provide for the procedures for adoption of regional water plans and for board approval of such plans. These sections also require the board to adopt rules to govern procedures for carrying out the responsibilities for regional water plans.

Statutory authority: The amendments and new section are adopted under the authority of Texas Water Code §6.101, which provides the board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, including Water Code §§35.004(d), 36.1071 - 36.1073, and 36.108(m), (n), and (o) which direct the board to assist and review in the development of groundwater district management plans, to approve plans properly adopted and submitted to the board, and to consider appeals of desired future conditions of groundwater resources.

§357.7. Regional Water Plan Development.

(a) Regional water plan development shall include the following:

(1) description of the regional water planning area including:

(A) wholesale water providers,

(B) current water use,

(C) identified water quality problems,

(D) sources of groundwater and surface water including major springs that are important for water supply or natural resource protection purposes,

(E) major demand centers,

(F) agricultural and natural resources,

(G) social and economic aspects of the regional water planning area including information on current population and primary economic activities including businesses dependent on natural water resources,

(H) assessment of current preparations for drought within the regional water planning area,

(I) summary of existing regional water plans,

(J) summary of recommendations in state water plan,

(K) summary of local water plans,

(L) any identified threats to the agricultural and natural resources of the regional water planning area due to water quantity problems or water quality problems related to water supply, and

(M) information compiled by the board from water loss audits performed by retail public utilities pursuant to §358.6 of this title (relating to Water Loss Audits);

(2) presentation of current and projected population and water demands. Results shall be reported:

(A) by

(i) city for cities with populations greater than 500 people,

(ii) retail public utility for counties that have less than five retail public utilities which provide more than 280 acre-feet per year for municipal use,

(iii) individual retail public utility or collective data for all such retail public utilities that form a logical reporting unit, such as being served by a common wholesale water provider or having a common source or other association appropriate for the area, in the judgment of the regional water planning group, for counties with more than five retail public utilities which provide more than 280 acre-feet per year for municipal use, and

(iv) categories of water use (including municipal not otherwise reported, manufacturing, irrigation, steam electric power generation, mining, and livestock watering) for each county or portion of a county in the regional water planning area. If a county or portion of a county is in more than one river basin, data shall be reported for each river basin;

(B) for each wholesale water provider by category of water use (municipal, manufacturing, irrigation, steam electric power generation, mining, and livestock) for each county or portion of a county in the regional water planning area. If a county or portion of a county is in more than one river basin, data shall be reported for each river basin. The wholesale water provider's current contractual obligations to supply water must be reported in addition to any demands projected for the wholesale water provider;

(C) to include an adjustment to each municipal demand due to water savings from using plumbing fixtures identified in Chapter 372 of the Texas Health and Safety Code. The regional water planning group shall determine and report the extent to which such plumbing fixtures impact projected municipal water use using parameters approved by the executive administrator.

(3) evaluation of adequacy of existing water supplies legally and physically available to the regional water planning area for use during drought of record. The evaluation shall consider surface water and groundwater data from the state water plan, existing water rights, contracts and option agreements, other planning and water supply studies, and analysis of water supplies existing in and available to the regional water planning area.

(A) For purposes of this subsection: "existing" means water supply available at the beginning of this task; and "firm yield" means the supply the reservoir can provide each year including during a drought of record using reasonable sedimentation rates and the assumption that all senior water rights will be totally utilized.

(B) Analysis of surface water available during drought of record shall be based on firm yield and may be based on operational procedures other than firm yield from reservoirs upon the written approval from the executive administrator who shall consider a written request from the regional water planning group to use other than firm yield.

(C) The planning group shall use available Texas Commission on Environmental Quality water availability models for evaluating the adequacy of surface water supplies. The planning group shall assume full utilization of existing water rights and no return flows when using the water availability models and the group may use better site specific information upon written approval from the executive administrator. Until information is provided by the Texas Commission on Environmental Quality, regional water planning groups may use estimates of the projected amount of surface water that would be available from existing water rights during a drought of record. Once this in-

formation is available from the Texas Commission on Environmental Quality, the regional water planning group shall incorporate it in its next planning cycle unless better site-specific information is available.

(D) Until information is available from the board regarding groundwater availability from modeling, the regional water planning groups may use estimates of the projected amounts as long as they describe the method used to arrive at those estimates. Once the groundwater availability modeling information is available for an area within a region, that regional water planning group shall incorporate such information in its next planning cycle unless better site-specific information is available.

(E) The executive administrator, after coordination with staff of the Texas Commission on Environmental Quality and the Texas Parks and Wildlife Department, shall identify the methodology, in consultation with representatives of regional water planning groups, to be used by regional water planning groups to calculate water availability during drought of record. The executive administrator shall provide available technical assistance to the regional water planning groups upon request to assist them in selecting appropriate methods and data to be used to determine water supply availability. Water supplies based on contracted agreements shall be based on the terms of the contract, which may be assumed to renew at the contract termination date if the contract contemplates renewal or extensions.

(F) Results of evaluations shall be reported by:

(i) city for cities with populations greater than 500 people,

(ii) retail public utility for counties that have less than five retail public utilities which provide more than 280 acre-feet per year for municipal use,

(iii) individual utility or collective data for all such retail public utilities that form a logical reporting unit, such as being served by a common wholesale water provider or having a common source or other association appropriate for the area, in the judgment of the regional water planning group, for counties with more than five retail public utilities which provide more than 280 acre-feet per year for municipal use, and

(iv) categories of water use (including municipal not otherwise reported, manufacturing, irrigation, steam electric power generation, mining, and livestock watering) for each county or portion of a county in the regional water planning area. If a county or portion of a county is in more than one river basin, data shall be reported for each river basin;

(G) for each wholesale water provider by category of water use (municipal, manufacturing, irrigation, steam electric power generation, mining, and livestock) for each county or portion of a county in the regional water planning area. If a county or portion of a county is in more than one river basin, data shall be reported for each river basin. The wholesale water provider's current contractual obligations to supply water must be reported in addition to any demands projected for the wholesale water provider;

(4) water supply and demand analysis comparing:

(A) water demands as developed in paragraph (2)(A) of this subsection with current water supplies available to the regional water planning area as developed in paragraph (3)(A) of this subsection to determine if the water users identified in paragraph (2)(A) of this subsection in the regional water planning area will experience a surplus of supply or a need for additional supplies. The social and economic impact of not meeting these needs shall be evaluated by the regional water planning groups and reported by regional water planning area and river basin. The executive administrator shall provide available technical assistance to the regional water planning groups, upon request, on water supply and demand analysis, including methods to evaluate the social and economic impacts of not meeting needs. Other results shall be reported by

(i) city for cities with populations greater than 500 people,

(ii) retail public utility for counties that have less than five retail public utilities which provide more than 280 acre-feet per year for municipal use,

(iii) individual utility or collective data for all such retail public utilities that form a logical reporting unit, such as being served by a common wholesale water provider or having a common source or other association appropriate for the area, in the judgment of the regional water planning group, for counties with more than five retail public utilities which provide more than 280 acre-feet per year for municipal use, and

(iv) categories of water use (including municipal not otherwise reported, manufacturing, irrigation, steam electric power generation, mining, and livestock watering) for each county or portion of a county in the regional water planning area. If a county or portion of a county is in more than one river basin, data shall be reported for each river basin;

(B) water demands as developed in paragraph (2)(B) of this subsection with current water supplies available to the wholesale water provider as developed in paragraph (3) of this subsection to determine if the wholesale water providers in the regional water planning area will experience a surplus of supply or a need for additional supplies. Results shall be reported for each wholesale water provider by categories of water use (including municipal, manufacturing, irrigation, steam electric power generation, mining, and livestock watering) for each county or portion of a county in the regional water planning area. If a county or portion of a county is in more than one river basin, data shall be reported for each river basin. The executive administrator shall provide available technical assistance to the regional water planning groups, upon request, on water supply and demand analysis;

(5) using the water supply needs identified in paragraph (4) of this subsection, water management strategies to be used during the drought of record to provide sufficient water supply to meet the needs identified in paragraph (4) of this subsection as follows:

(A) Water management strategies shall be developed for:

(i) city for cities with populations greater than 500 people,

(ii) retail public utility for counties that have less than five retail public utilities which provide more than 280 acre-feet per year for municipal use,

(iii) individual utility or collective data for all such retail public utilities that form a logical reporting unit, such as being served by a common wholesale water provider or having a common source or other association appropriate for the area, in the judgment of the regional water planning group, for counties with more than five retail public utilities which provide more than 280 acre-feet per year for municipal use, and

(iv) categories of water use (including municipal not otherwise reported, manufacturing, irrigation, steam electric power generation, mining, and livestock watering) for each county or portion of a county in the regional water planning area. If a county or portion

of a county is in more than one river basin, data shall be reported for each river basin;

(B) water management strategies shall be developed for wholesale water providers. The water management strategies shall also meet the new water supply obligations necessary to implement recommended water management strategies of other wholesale water providers and water users for which plans are developed under of this paragraph. Results shall be reported for each wholesale water provider by category of water use (municipal, manufacturing, irrigation, steam electric power generation, mining, and livestock) for each county or portion of a county in the regional water planning area. If a county or portion of a county is in more than one river basin, data shall be reported for each river basin;

(C) The plan to be used for water supply during drought of record shall meet all needs for the water use categories of municipal, manufacturing, irrigation, steam electric power generation, mining, and livestock watering except:

(i) plans may identify those needs for which no water management strategy is feasible. Full evaluation of water management strategies must be presented and reasons given for why no water management strategies are feasible; or

(ii) where a political subdivision that provides water supply (other than water supply corporations, counties, or river authorities) does not participate in the regional water planning effort for needs located within its boundaries or extraterritorial jurisdiction. The regional water planning group shall establish terms of participation that shall be equitable and shall not unduly hinder participation;

(6) presentations of the data required in paragraphs (2) - (5) of this subsection in subdivisions of the reporting units required such as reporting irrigation for a county by splitting it into two or more reporting units, if the regional planning group desires;

(7) evaluation of all water management strategies the regional water planning group determines to be potentially feasible, including:

(A) water conservation practices. The executive administrator shall provide technical assistance to the regional water planning groups on water conservation practices. The regional water planning group must consider water conservation practices for each need identified in paragraph (4) of this subsection.

(i) The regional water planning group shall include water conservation practices for each user group to which Texas Water Code §11.1271 applies. The impact of these water conservation practices on water needs must be consistent with the requirements in appropriate Texas Commission on Environmental Quality administrative rules related to §11.1271.

(ii) The regional water planning group shall consider water conservation practices for each user group beyond the minimum requirements of clause (i) of this subparagraph, whether or not the water user group is subject to Texas Water Code §11.1271. If it does not adopt a water conservation strategy that exceeds minimum levels, it shall document the reason.

(iii) For each water user group or wholesale water provider that is to obtain water from a proposed interbasin transfer to which Texas Water Code §11.085(l) applies, the regional water planning group shall include a conservation water management strategy, pursuant to §11.085(1), that will result in the highest practicable level of water conservation and efficiency achievable. The regional water planning group shall determine and report the projected water use in gallons per capita per day for municipal uses based on its determination of the highest practicable level of water conservation and efficiency achievable. The regional water planning group shall develop conservation water management strategies based on this determination. In preparing the evaluation, the regional water planning group shall seek the input of the water user groups and wholesale water providers as to what is the highest practicable level of water conservation and efficiency achievable, in their opinion, and take that input into consideration. The regional water planning groups shall develop the conservation water management strategy consistent with the guidance provided by the Texas Commission on Environmental Quality in its administrative rules that implement Texas Water Code §11.085. The strategy evaluation shall include a quantitative description of the quantity, cost, and reliability of the water estimated to be conserved under the highest practicable level of water conservation and efficiency achievable;

(iv) The regional water planning group shall consider strategies to address any issues identified in the information compiled by the board from the water loss audits performed by retail public utilities pursuant to §358.6 of this title (relating to Water Loss Audits);

(B) drought management measures including water demand management. The executive administrator shall provide technical assistance to the regional water planning groups on drought management measures. The regional water planning group must consider drought management measures for each need identified in paragraph (4) of this subsection and must include such measures for each user group to which Texas Water Code §11.1272 applies. The impact of these drought management measures on water needs must be consistent with the guidance provided by the Texas Commission on Environmental Quality in its administrative rules that implement Texas Water Code §11.1272. If the regional water planning group does not adopt a drought management strategy for a need that goes beyond the requirements of §11.1272, it must document the reason. Nothing in this paragraph shall be construed as limiting the use of voluntary arrangements by water users to forgo water usage during drought periods;

(C) reuse of wastewater;

(D) expanded use of existing supplies including systems optimization and conjunctive use of resources, reallocation of reservoir storage to new uses, voluntary redistribution of water resources including contracts, water marketing, regional water banks, sales, leases, options, subordination agreements, and financing agreements, subordination of existing water rights through voluntary agreements, enhancements of yields of existing sources, and improvement of water quality including control of naturally occurring chlorides;

(E) new supply development including construction and improvement of surface water and groundwater resources, brush control, precipitation enhancement, desalination, water supply that could be made available by cancellation of water rights based on data provided by the Texas Commission on Environmental Quality, aquifer storage and recovery;

(F) interbasin transfers;

(G) other measures; and

(H) the regional water planning group may substitute one or more evaluated alternative water management strategies for others if the strategy originally recommended under subsection (a)(9) of this section is no longer recommended. The proposed substitution may not result in a water management strategy that is in excess of 125% of recognized needs of the water user group for which the substituted strategy is recommended. Any proposed substitution must be submitted for approval to the executive administrator. If the regional water planning group can demonstrate to the executive administrator that there is good cause for the requested strategy substitution and for exceeding

the 125% limit, then the executive administrator may issue a written approval of the substitution.

(8) evaluations of all water management strategies the regional water planning group determines to be potentially feasible by including:

(A) a quantitative reporting of:

(i) the quantity, reliability, and cost of water delivered and treated for the end user's requirements, incorporating factors to be used in the calculation of infrastructure debt payments, present costs, and discounted present value costs provided by the executive administrator;

(ii) environmental factors including effects on environmental water needs, wildlife habitat, cultural resources, and effect of upstream development on bays, estuaries, and arms of the Gulf of Mexico;

(iii) impacts on agricultural resources;

(B) impacts on other water resources of the state including other water management strategies and groundwater surface water interrelationships;

(C) for each threat to agricultural and natural resources identified pursuant to paragraph (1) of this subsection, a discussion of how that threat will be addressed or affected by the water management strategies evaluated;

(D) any other factors as deemed relevant by the regional water planning group including recreational impacts;

(E) equitable comparison and consistent application of all water management strategies the regional water planning groups determines to be potentially feasible for each water supply need;

(F) consideration of the provisions in Texas Water Code, §11.085(k)(1) for interbasin transfers of surface water. At a minimum, this consideration shall include a summation of water needs in the basin of origin and in the receiving basin, based on needs presented in the applicable approved regional water plan;

(G) consideration of third party social and economic impacts resulting from voluntary redistributions of water, including analysis of third-party impacts of moving water from rural and agricultural areas; and

(H) consideration of water pipelines and other facilities that can be used for water conveyance as described in subsection (a)(1)(M) of this section; and

(9) specific recommendations of water management strategies to meet the needs in sufficient detail to allow state agencies to make financial or regulatory decisions to determine the consistency of the proposed action before the state agency with an approved regional water plan. Strategies shall be selected so that cost effective water management strategies which are consistent with long-term protection of the state's water resources, agricultural resources, and natural resources are adopted;

(10) regulatory, administrative, or legislative recommendations that the regional water planning group believes are needed and desirable to: facilitate the orderly development, management, and conservation of water resources and preparation for and response to drought conditions in order that sufficient water will be available at a reasonable cost to ensure public health, safety, and welfare; further economic development; and protect the agricultural and natural resources of the state and regional water planning area. The regional water planning group may develop information as to the potential impact once proposed changes in law are enacted;

(11) a chapter consolidating the water conservation and drought management recommendations of the regional water plan;

(12) a description of the major impacts of recommended water management strategies on key parameters of water quality identified by the regional water planning group as important to the use of the water resource and comparing conditions with the recommended water management strategies to current conditions using best available data;

(13) a chapter describing how the regional water plan is consistent with long-term protection of the state's water resources, agricultural resources, and natural resources as required in §357.14(2)(C) of this title (relating to Approval of Regional Water Plans by the Board); and

(14) a chapter describing the financing needed to implement the water management strategies recommended. The description shall include how local governments, regional authorities, and other political subdivisions in the regional water planning area propose to pay for water management strategies identified in the regional water plan.

(b) Specific recommendations of water management strategies to meet an identified need will not be shown as meeting the need for a political subdivision if the political subdivision to supply or to be provided water supplies objects to inclusion of the strategy for such political subdivision and specifies its reasons for such objection. This does not prevent the inclusion of the strategy to meet other needs.

(c) The regional water planning group shall include in its regional water plan a model water conservation plan pursuant to Texas Water Code §11.1271.

(d) The regional water planning group shall include in its regional water plan a model drought contingency plan pursuant to Texas Water Code §11.1272.

(e) The executive administrator shall provide technical assistance within available resources to the regional water planning groups requesting such assistance in performing regional water planning activities and if requested, may facilitate resolution of conflicts within regional water planning areas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 29, 2008.

TRD-200800517
Jim Bateman
Staff Attorney
Texas Water Development Board
Effective date: February 18, 2008
Proposal publication date: November 16, 2007
For further information, please call: (512) 463-4946

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 15. TEXAS VETERANS COMMISSION

CHAPTER 455. TAPS PROGRAM

40 TAC §§455.1 - 455.5

The Texas Veterans Commission (commission) adopts new Chapter 455, regarding "Taps Program", which will be located in Title 40, Part 15, of the Texas Administrative Code. Chapter 455 will include §455.1, "Purpose"; §455.2, "Application"; §455.3, "Definitions"; §455.4, "Process"; and §455.5, "Adoption of Standard Form". The sections are adopted without changes to the proposed text as published in the November 9, 2007, issue of the *Texas Register* (32 TexReg 8113) and therefore, will not be republished.

The purpose of Chapter 455 is to establish the responsibilities, composition, and terms for Taps vouchers. This chapter is authorized under §434.0072 of the Texas Government Code, granting the commission the authority to establish Taps vouchers for the sounding of Taps at military funerals.

There were no comments received regarding the new sections.

The new sections are adopted under Texas Government Code, Chapter 434, §434.010, which authorizes the commission to adopt rules it considers necessary for its administration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 29, 2008.

TRD-200800475
Tina Coronado
General Counsel
Texas Veterans Commission
Effective date: February 18, 2008
Proposal publication date: November 9, 2007
For further information, please call: (512) 463-1981

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PART 19. DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

CHAPTER 700. CHILD PROTECTIVE SERVICES

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§700.203, 700.1351, 700.1403, and 700.1404, without changes to the proposed text published in the November 2, 2007, issue of the *Texas Register* (32 TexReg 7864). The justification for the amendments is to update the rules to reflect the changes required in Senate Bill 6 of the 79th Legislative Session, which added Chapter 266 to the Texas Family Code to address medical consent for children in DFPS conservatorship. The major provisions are: (1) requirement for an individual to be authorized by the court or designated by DFPS to consent for medical care for each child in DFPS conservatorship; (2) completion of training on informed consent by the medical consenter; (3) participation in each medical appointment by the medical consenter; (4) informing 16 and 17 year old youth of rights to a court determination of their capacity to consent to some or all of their medical care; (5) requirement to include informed consent training in the PAL curriculum; (6) obtaining medical care in an emergency; (7) judicial review of medical care; and (8) notifying parents of significant medical conditions.

Section 700.203 adds the provision that DFPS may release confidential case record information to the medical consenter, and clarifies that the same restrictions on disclosure of confidential records to DFPS apply to re-disclosure by the party who receives the records.

Section 700.1351 defines medical care, clarifies that consent for medical care for children in DFPS conservatorship must be provided in accordance with Chapter 266 of the Texas Family Code, and deletes the procedures pertaining to medical care that no longer apply.

Section 700.1403 clarifies that DFPS may provide information about the child's AIDS/HIV status to the medical consenter.

Section 700.1404 adds the child's "medical consenter" to the provision that a child's caretaker may release information about a child's HIV status only to certain parties in specific circumstances. Also, TDPRS is changed to DFPS in all of the rules.

The amendments will function by ensuring that children in DFPS conservatorship will likely benefit from improved health outcomes through the provision of consistent, coordinated and informed decisions concerning their health care.

No comments were received regarding adoption of the amendments.

SUBCHAPTER B. CONFIDENTIALITY AND RELEASE OF RECORDS

40 TAC §700.203

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements the Texas Family Code, Chapter 266.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800582
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER M. SUBSTITUTE-CARE SERVICES

40 TAC §700.1351

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements the Texas Family Code, Chapter 266.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800583
Gerry Williams
General Counsel
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Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER N. AIDS POLICIES FOR CHILDREN IN DFPS'S CONSERVATORSHIP

40 TAC §700.1403, §700.1404

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement the Texas Family Code, Chapter 266.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800584
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER H. ADOPTION ASSISTANCE PROGRAM
DIVISION 6. HEALTH COVERAGE BENEFIT (HCB) STIPEND

40 TAC §§700.890 - 700.894

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), new §§700.890 - 700.894, in its Child Protective Services chapter. New §700.892 and §700.893 are adopted with changes to the proposed text published in the November 2, 2007, issue of the *Texas Register* (32 TexReg 7867). Sections 700.890, 700.891, and 700.894 are adopted without changes to the proposed text and will not be republished. The justification for the new sections is to implement the Heath Coverage Benefit (HCB) Stipend program, as required by House Bill 2702 of the 80th Legislative Session, Texas Family Code §162.304. The HCB Stipend program provides $150 per month toward health care coverage for families who adopt a child in the managing conservatorship of DFPS and whose family income is less than 300% of the federal poverty level. Additionally, the child cannot be eligible for Medicaid under Chapter 32 of the Texas Human Resources Code. The money is for the purpose of assisting the adoptive parents in covering the costs of health insurance premiums for the adopted child.

Section 700.890 describes the HCB stipend.

Section 700.891 lists the HCB stipend eligibility requirements.

Section 700.892 lists the documents that must be provided to establish eligibility for the HCB stipend.

Section 700.893 describes when the stipend is paid.

Section 700.894 clarifies that eligibility for the HCB stipend does not confer eligibility for the tuition exemption available under §54.211 of the Education Code.

The new sections will function by ensuring that additional children will have access to health care coverage.

During the public comment period, DFPS received comments from Texans Care for Children. A summary of the comments and DFPS's responses follow:

Two comments were received concerning §700.892:

(1) The commenter suggested that requiring proof of a Medicaid denial was a barrier to the program inasmuch as proof of income is already required as a condition of eligibility and the Medicaid denial would therefore be duplicative, and inasmuch as delays and backlogs at HHSC make the requirement burdensome.

Response: DFPS disagrees with this comment but does believe the wording can be clarified. The statute upon which these rules are based requires as a condition of eligibility that a child not be eligible for medical assistance under Chapter 32 of the Texas Human Resources Code. While it is true that income is rele-

vant to medical assistance eligibility, it is not dispositive. DFPS is not authorized to make such a determination; HHSC is. Furthermore, any burden created by the requirement will be offset by the fact that proof of a Medicaid denial will not be required in order to recertify eligibility. However, this fact may not be obvious in the current wording of the rule. The word "Initial" was added to the question to make it clear that the documentation requirements of this rule only apply to the "initial" eligibility determination. And the requirements for continuing eligibility were clarified at §700.893(b), which does not require ongoing Medicaid denials.

(2) The commenter expressed concern that requiring proof of current insurance coverage is inconsistent with the intent of the legislation, which the commenter asserted is to enable a family to acquire health insurance with a stipend.

Response: DFPS agrees that there may be some families who will not have health care coverage but will be enabled to obtain coverage by the program. Accordingly, §700.892(a)(4)(B) and §700.892(b) are added to clarify that families have 30 days following the initial stipend payment to obtain proof that health care coverage has been activated.

Comments concerning §700.893: The commenter indicated that requiring recertification of eligibility "at least" once every 12 months could lead to a family being eligible for an abbreviated period that is less than 12 months.

Response: DFPS agrees in part and disagrees in part with the commenter. DFPS must ensure that it is carrying out the program in a manner consistent with the statutory directive that the subsidy is used to "obtain and maintain" health care coverage. Therefore, DFPS has retained the recertification requirement. However, DFPS agrees the language regarding documentation requirements should be clarified and there should be some leeway to prevent abbreviated periods of eligibility. As noted above in the first comment, the §700.892 documentation requirements were clarified to only apply to the "initial" eligibility determination, and the two remaining requirements for continuing eligibility were clarified at §700.893(b); DFPS has also clarified in subsection (e) that retroactive payments of up to 60 days are allowed for restored benefits; finally, DFPS edited several sections of this rule to improve clarity.

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement the Texas Family Code, §162.304, Subsections (b-1), (b-2), and (g), which were added by House Bill 2702, enacted in the 80th Legislative Session.

§700.892. What documents must an adoptive parent submit to DFPS to establish initial eligibility for the HCB stipend?

(a) An adoptive parent must submit:

(1) A final adoption order;

(2) Proof of income, such as a W-2 form, verification of earnings statement from an employer, or other reliable source;

(3) Proof of denial of medical assistance benefits under Chapter 32 of the Human Resources Code; and

(4) Proof that the:

(A) Child in question currently has health coverage benefits paid for by the adoptive parent, and the amount of the monthly premium; or

(B) Adoptive parent has obtained a quote for health coverage benefits that will be obtained for the child in question following receipt of the stipend; and

(b) A parent who provides a quote for health care coverage as provided under subsection (a)(4)(B) must provide proof that the parent obtained health care coverage for the child in question within 30 days of the date on which the first HCB stipend payment is issued.

§700.893. When is the HCB stipend paid?

(a) The HCB stipend is payable for the first month following receipt of all necessary documents to prove eligibility under §700.892 of this title (relating to What documents must an adoptive parent submit to DFPS to establish initial eligibility for the HCB stipend?). Retroactive benefits are not available for the initial eligibility determination.

(b) Continuing eligibility for the monthly HCB stipend must be recertified every 12 months after the initial HCB stipend payment is issued. In order to recertify the child, the parent must provide by the annual recertification date:

(1) Proof of current income as required in subsection (a)(2) of §700.892 of this title; and

(2) Proof that the adoptive parent maintained health care coverage for the child, as required in subsection (a)(4)(A) of §700.892 of this title.

(c) Notwithstanding any provision of this section, if DFPS determines that changes in the parent's circumstances may have rendered the family ineligible for the HCB stipend, including the termination of a child's health care coverage, DFPS may require proof of continued eligibility prior to the recertification required in subsection (b) of this section. The adoptive parent must submit the proof required within 30 days of DFPS's request.

(d) Failure to submit documentation for initial eligibility as required by §700.892 of this title, or for continuing eligibility as required by this section, will result in termination of payments.

(e) Benefits that have been terminated may be restored upon receipt of the required documentation. Restored benefits may be retroactive for a maximum of 60 days.

(f) Any sums paid to a parent for which the parent was ineligible must be repaid to DFPS.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800608
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER R. STRENGTHENING FAMILIES THROUGH ENHANCED IN-HOME SUPPORT PROGRAM

40 TAC §§700.1801 - 700.1805

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), new §§700.1801 - 700.1805, without changes to the proposed text published in the November 2, 2007, issue of the *Texas Register* (32 TexReg 7868). The rules are adopted in new Subchapter R, Strengthening Families Through Enhanced In-Home Support Program. Senate Bill 758, 80th Legislature, requires DFPS to implement an enhanced in-home support program that diverts children from foster care or shortens their stay in substitute care. The Strengthening Families Through Enhanced In-Home Support program will assist certain low-income families and children in child neglect cases in which poverty is believed to be a significant underlying cause of the neglect and in which the enhancement of in-home support appears likely to prevent removal of the child from the home or to speed reunification of the child with the family.

Section 700.1801 provides an overview of the Strengthening Families Through Enhanced In-Home Support program.

Section 700.1802 describes generally what two types of benefits are available: (1) Family Enhancement through monetary assistance; and (2) Family Empowerment through purchasing goods and services.

Section 700.1803 describes the monetary limits and restrictions for the Family Enhancement benefits. The family determines how to make the best use of these benefits, subject to certain legal limitations.

Section 700.1804 describes the monetary limits and restrictions for the Family Empowerment benefits. The family determines how to make the best use of these benefits, subject to certain legal limitations.

Section 700.1805 describes the eligibility requirements for the program.

The new sections will function by ensuring that children will remain with their families or will return to their families more quickly.

During the public comment period, DFPS received comments from Texans Care for Children. A summary of the comments and DFPS's responses follow:

Comment concerning §700.1803(a) and §700.1804(a): These sections establish maximum dollar amounts that may be provided by DFPS to a family for cash assistance and for purchased goods and services. The commenter requested greater specificity about whether a family could receive the maximum assistance and benefits more than once after a period of time or based on the number of investigations. The commenter expressed concern that there was a risk of disparate implementation of the program throughout the state.

Response: DFPS agrees that the needs of children must be addressed uniformly throughout the state. Because the program is a pilot program based on available funding, a family will not be eligible to receive any more assistance or benefits after they have received the maximum, regardless of the passage of time or number of investigations. The language in §700.1802(b) sufficiently clarifies that the maximum limits "apply to each eligible family, regardless of the number of DFPS investigations." DFPS is adopting these sections without change.

Comment concerning §700.1805(a)(5): Among the eligibility criteria, this rule requires a family to be comprised of a parent or a managing conservator. The commenter recommended that "a guardian in actual custody of a child also be eligible" so that the benefits of the program could extend beyond families in which there is a parent or managing conservator. The commenter also noted that eligibility for other programs is based on the child and not on the legal status of the parent or guardian.

Response: DFPS appreciates the commenter's concerns for children living in households headed by people other than parents or managing conservators. However, because of the limited resources for this program, its focus is on strengthening families headed by parents or managing conservators. DFPS is adopting this section without change.

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement Texas Family Code, §264.2011.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800609
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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CHAPTER 711. INVESTIGATIONS IN DADS MENTAL RETARDATION AND DSHS MENTAL HEALTH FACILITIES AND RELATED PROGRAMS

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§711.1, 711.3, 711.7, 711.11, 711.23, 711.201, 711.401, 711.403, 711.405, 711.415, 711.417, 711.603, 711.605, 711.607, 711.611, 711.613, 711.801, 711.1001, 711.1003, 711.1005, 711.1007, 711.1009, 711.1011, 711.1013, 711.1203, 711.1205, 711.1207, 711.1401, 711.1405, 711.1407, 711.1411, 711.1413, 711.1415, 711.1417, 711.1419, 711.1421, 711.1425, 711.1427, 711.1429, 711.1431, 711.1433, 711.1435; new §711.1002; and the repeal of §711.1209, in its Investigations in

DADS Mental Retardation and DSHS Mental Health Facilities and Related Programs chapter. The amendments to §§711.3, 711.201, 711.401, 711.605, and 711.1001 are adopted with changes to the proposed text published in the August 10, 2007, issue of the *Texas Register* (32 TexReg 4949). The amendments to §§711.1, 711.7, 711.11, 711.23, 711.403, 711.405, 711.415, 711.417, 711.603, 711.607, 711.611, 711.613, 711.801, 711.1003, 711.1005, 711.1007, 711.1009, 711.1011, 711.1013, 711.1203, 711.1205, 711.1207, 711.1401, 711.1405, 711.1407, 711.1411, 711.1413, 711.1415, 711.1417, 711.1419, 711.1421, 711.1425, 711.1427, 711.1429, 711.1431, 711.1433, 711.1435; new §711.1002; and the repeal of §711.1209 are adopted without changes to the proposed text and will not be republished.

The justification for the rule changes is to clarify investigator responsibilities when the administrator or CEO of a state-operated mental health or mental retardation facility or related program is the perpetrator or alleged perpetrator in an investigation. The changes also update references to agency names and affected sections of the Texas Administrative Code resulting from the consolidation of the Health and Human Services agencies.

The amendment to §711.3: (a) clarifies that the Texas Home Living Medicaid waiver program is considered a Home and Community-Based Services Waiver (HCSW) program; (b) adds a definition for HCSW CEO/Administrator Designee; (c) updates statutory references to the various professional groups that are Mental Health Service Providers; and (d) clarifies which definitions apply only to community centers and HCSW programs, and which definitions apply only to DADS and DSHS state-operated facilities.

The amendments to §§711.11, 711.23, 711.405, 711.611, and 711.613 update references to the Texas Administrative Code as a result of the consolidation of the Health and Human Services agencies.

Section 711.201 clarifies that allegations may be reported to Statewide Intake via the Internet, in addition to the toll-free number.

Section 711.401 clarifies investigator responsibilities for making notifications at the start of an investigation when the alleged perpetrator is the administrator or CEO.

Section 711.605 clarifies to whom the investigator releases the investigative report when the administrator is the perpetrator or alleged perpetrator.

The title of §711.607 is revised for clarity.

Section 711.1001 clarifies who may request a review of the finding when the administrator or contractor CEO is the perpetrator or alleged perpetrator.

New §711.1002 is added to clarify how a request for review by the administrator is affected by the perpetrator's request for an Employee Misconduct Registry Hearing.

Sections 711.1003, 711.1007, 711.1009, 711.1011, 711.1203, and 711.1207 are revised to change the term "Director" to "Assistant Commissioner." Also, the title of §711.1003 is revised and §711.1207(4)(B) adds language that was repealed in §711.1209, concerning who is notified of an appeal decision.

In addition to the changes already listed above, the other rules in this package are revised to: (1) update the agency name to Department of Family and Protective Services (DFPS); (2) update the agency name of the Texas Department of Mental Health and Mental Retardation (TDMHMR) to Texas Department of Aging and Disability Services (DADS) and Texas Department of State Heath Services (DSHS), as appropriate; (3) update the Consumer Services and Rights Protection (TDMHMR) to Consumer Rights and Services (DADS) and Consumer Services and Rights Protection (DSHS); and (4) update the term "executive director" of DFPS to "commissioner."

The sections will function by ensuring that investigations conducted in DADS Mental Retardation and DSHS Mental Health Facilities and Related Programs will be conducted more efficiently and provide greater protection to persons being served by these facilities and programs.

During the comment period, DFPS received comments from Advocacy Incorporated, Department of Aging and Disability Services, and Department of State Health Services. A summary of the comments and responses to the comments follows:

General comment: One commenter recommended that language be added to Chapter 711 indicating that the Director of State Schools receives a copy of the final Investigative report of investigations conducted in state schools.

Response: Adding such language would be a substantive change to the proposed rules and would require publication for review and comment. This cannot be accomplished with this rule adoption.

Comments concerning §711.3:

(1) One commenter noted that in paragraph (9), Consumer Rights and Services at DADS state office is a section, not a unit.

Response: DFPS agrees and has revised the language.

(2) Concerning paragraph (18), one commenter recommended that references to "state centers" be removed throughout Chapter 711. The commenter notes that the term is obsolete in that what were formerly understood to be state centers are now covered by the terms state hospital, state school and community center.

Response: DFPS acknowledges that the functions of the remaining two state centers, El Paso State Center and Rio Grande State Center, have changed. However, until the names of these two facilities are officially changed, it would create confusion in the context of these rules to refer to them as anything other than state centers. DFPS is not revising the language in paragraph (18) or §§711.401, 711.605, and 711.611.

(3) Concerning paragraph (24), one commenter noted that during the 80th Texas Legislature, the Health and Safety Code was amended to state that the HHSC executive commissioner shall designate a local mental health authority and a local mental retardation authority, rather than the DADS or DSHS commissioner.

Response: DFPS agrees, and has revised the language.

(4) Concerning paragraphs (26) and (36), one commenter recommended that references to local authorities be added where community centers are mentioned. The commenter notes that not all community centers are local authorities.

Response: DFPS agrees, and has revised the language in these paragraphs, as well as in §§711.401, 711.605, and 711.1001.

Comments concerning §711.401:

(1) One commenter noted that a local authority has a board of directors, while a community center has a board of trustees.

Response: DFPS agrees, and has revised the language accordingly.

(2) One commenter requested that in addition to the investigator notifying Consumer Rights and Services at DADS when receiving an allegation where a community center administrator or CEO is the alleged perpetrator, the investigator also notify Consumer Services and Rights Protection at DSHS.

Response: DFPS agrees, and has revised the language accordingly.

(3) One commenter noted that for investigations involving HCSW programs where the Administrator or CEO is the alleged perpetrator, the process of identifying the HCSW CEO/Administrator Designee should be done proactively rather than at the start of the investigation. The commenter also recommended that the criteria for selecting the HCSW CEO/Administrator Designee be specified to include that it: (1) cannot be a family member; and (2) be someone who knows and understands HCSW programs, including rights issues and contract requirements.

Response: These recommendations are beyond the scope of DFPS rules. DADS would have to mandate these requirements of the providers. However, in response to this comment DFPS has modified the language in (1) §711.3(20) to only define the role of the designee instead of who is responsible for making the designation, and (2) §711.401(b) to notify the designee of the allegation instead of notifying the CEO or Administrator to request a designee and then notifying. These changes allow for greater flexibility for a subsequent solution to this problem. The language is revised accordingly.

Comments concerning §711.605:

(1) In subsection (a)(4)(D), one commenter notes that the phrase "instead of the CEO/Administrator" is redundant since these subsections clearly address actions to be taken when the CEO/Administrator is the alleged perpetrator.

Response: DFPS agrees, and has revised the language. DFPS has also revised §711.1001(b)(3), accordingly.

(2) In subsection (a)(4)(E), one commenter recommended that language be added to clarify who receives the investigative report when the administrator is the alleged perpetrator.

Response: DFPS disagrees. The language states who is to receive the investigative report when the administrator is the alleged perpetrator. DFPS is not revising the language.

Comment concerning §711.1207: One commenter noted that the language in paragraph (4)(B) could be clearer if stated as follows, "the victim or alleged victim, or the parent or guardian if the victim or alleged victim is a child."

Response: DFPS disagrees, and is not revising the section. An adult person may also have a guardian.

In addition, DFPS is revising the language in §711.201 because it is confusing. DFPS is deleting information to clarify reporting responsibilities. In §711.1001(b)(3), DFPS has changed the reference from the HCS CEO/Administrator Designee to the HCSW CEO/Administrator Designee.

SUBCHAPTER A. INTRODUCTION

40 TAC §§711.1, 711.3, 711.7, 711.11, 711.23

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC, Chapter 48, Subchapters F, H, and I.

§711.3. How are the terms in this chapter defined?

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

(1) Administrator--The person in charge of a facility, local authority, community center, or home and community-based services waiver program, or designee.

(2) Adult--An adult is a person:

(A) 18 years of age or older; or

(B) under 18 years of age who:

(i) is or has been married; or

(ii) has had the disabilities of minority removed pursuant to the Texas Family Code, Chapter 31.

(3) APS--Adult Protective Services, a division of DFPS.

(4) Agent--An individual (e.g., student, volunteer), not employed by but working under the auspices of a:

(A) facility, local authority, community center, or home and community-based services waiver program; or

(B) contractor of one of the programs listed in subparagraph (A) of this paragraph.

(5) Allegation--A report by an individual that a person served has been or is in a state of abuse, neglect, or exploitation as defined by this subchapter.

(6) Child--A person under 18 years of age who:

(A) is not and has not been married; or

(B) has not had the disabilities of minority removed pursuant to the Texas Family Code, Chapter 31.

(7) Clinical practice--Relates to the demonstration of professional competence in nursing, dental, pharmacy, or medical practice as described in the Nursing Practice Act, Vocational Nurse Act, Dental Practice Act, Pharmacy Practice Act, or Medical Practice Act.

(8) Community center--A community mental health center, community mental retardation center, or community mental health and mental retardation center, established under the Texas Health and Safety Code, Title 7, Chapter 534, Subchapter A.

(9) Consumer Rights and Services--The section at DADS' state office charged with protecting the rights of persons served.

(10) Consumer Services and Rights Protection--The unit at DSHS' central office charged with protecting the rights of persons served.

(11) Contractor--Any organization, entity, or individual who contracts with a facility, local authority, community center, or HCSW to provide mental health and/or mental retardation services directly to a person served. The term includes a local independent

school district with which a facility, local authority, or community center has a memorandum of understanding (MOU) for educational services.

(12) Contractor CEO--The person in charge of a contractor that has one or more employees, excluding the CEO.

(13) DADS--Department of Aging and Disability Services.

(14) DFPS--Department of Family and Protective Services.

(15) DSHS--Department of State Health Services.

(16) Emergency order for protective services--A court order for protective services obtained under Human Resources Code, §48.208.

(17) Emergency services--Services necessary to immediately protect a person served by an HCSW from serious physical harm or death. Examples include, but are not limited to, arranging for:

(A) an emergency order for protective services;

(B) shelter;

(C) medical and psychiatric assessments and/or treatment; and

(D) food, medication, or other supplies.

(18) Facility--A state hospital, state school, or state center that is operated by DADS or DSHS.

(19) Home and community-based services waiver (HCSW) programs--The Home and Community-based Services and the Texas Home Living Medicaid waiver programs authorized under the Social Security Act, §1915(c), operated by DADS under the authority of the Texas Health and Human Services Commission, that are exempt from licensure in accordance with Health and Safety Code, §142.003(a)(19).

(20) HCSW CEO/Administrator Designee--The person designated to perform the duties of the CEO/Administrator for the purposes of the investigation when the CEO/Administrator is the alleged perpetrator in an investigation.

(21) Incitement--To spur to action or instigate into activity; implies responsibility for initiating another's actions.

(22) Individual with a disability receiving services--A disabled person as defined in the Human Resources Code, Chapter 48, receiving services from a:

(A) facility, local authority, community center, HCSW; or

(B) contractor or agent of one of the programs listed in subparagraph (A) of this paragraph.

(23) Investigator--An employee of the division of Adult Protective Services who has:

(A) demonstrated competence and expertise in conducting investigations; and

(B) received training on techniques for communicating effectively with individuals with a disability.

(24) Local authority--An entity designated by the HHSC Executive Commissioner in accordance with the Texas Health and Safety Code, §533.035(a).

(25) Mental health services provider--In accordance with the Texas Civil Practice and Remedies Code, §81.001, an individual, licensed or unlicensed, who performs or purports to perform mental health services, including a:

(A) licensed social worker as defined by §505.002, Occupations Code;

(B) chemical dependency counselor as defined by §504.001, Occupations Code;

(C) licensed professional counselor as defined by §503.002, Occupations Code;

(D) licensed marriage and family therapist as defined by §502.002, Occupations Code;

(E) member of the clergy;

(F) physician who is practicing medicine as defined by §151.002, Occupations Code;

(G) psychologist offering psychological services as defined by §501.003, Occupations Code; or

(H) special officer for mental health assignment certified under §1701.404, Occupations Code.

(26) Non-serious physical injury (in Community Centers, Local Authorities, and HCSW Programs)--Any injury determined not to be serious by the appropriate medical personnel. Examples of non-serious physical injury include the following:

(A) superficial laceration;

(B) contusion two and one-half inches in diameter or smaller; or

(C) abrasion.

(27) Non-serious physical injury (in DADS and DSHS facilities only)--Any injury requiring minor first aid and determined not to be serious by a registered nurse, advanced practice nurse (APN), or physician.

(28) Peer review--A review of clinical and/or:

(A) medical practice(s) by peer physicians;

(B) dental practice(s) by peer dentists;

(C) pharmacy practice(s) by peer pharmacists; or

(D) nursing practice(s) by peer nurses.

(29) Perpetrator--A person who has committed an act of abuse, neglect, or exploitation.

(30) Person served--An individual with a disability receiving services, or a child receiving services in a:

(A) facility or HCSW who is registered or assigned in the Client Assignment and Registration (CARE) system; or

(B) community center or local authority who is registered or assigned in CARE or who is otherwise receiving services from a community center or local authority, either directly or by contract.

(31) Preponderance of evidence--The greater weight of evidence, or evidence which is more credible and convincing to the mind.

(32) Prevention and management of aggressive behavior (PMAB)--DADS and DSHS' proprietary risk management program that uses the least intrusive, most effective options to reduce the risk of injury for persons served and staff from acts or potential acts of aggression.

(33) Professional review--A review of clinical and/or professional practice(s) by peer professionals.

(34) Program--A facility, local authority, community center, or HCSW.

(35) Reporter--The person, who may be anonymous, making an allegation.

(36) Serious physical injury (in Community Centers, Local Authorities, and HCSW Programs)--Any injury determined to be serious by the appropriate medical personnel. Examples of serious physical injury include the following:

(A) fracture;

(B) dislocation of any joint;

(C) internal injury;

(D) contusion larger than two and one-half inches in diameter;

(E) concussion;

(F) second or third degree burn; or

(G) any laceration requiring sutures.

(37) Serious physical injury (in DADS and DSHS facilities only)--Any injury requiring medical intervention or hospitalization or any injury determined to be serious by a physician or advanced practice nurse (APN). Medical intervention is treatment by a licensed medical doctor, osteopath, podiatrist, dentist, physician's assistant, or advanced practice nurse (APN). For the purposes of this subchapter, medical intervention does not include first aid, an examination, diagnostics (e.g., x-ray, blood test), or the prescribing of oral or topical medication.

(38) Sexually transmitted disease--Any infection with or without symptoms or clinical manifestations that can be transmitted from one person to another by sexual contact.

(39) Victim--A person served who is alleged to have been abused, neglected, or exploited.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800588
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: August 10, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER C. DUTY TO REPORT

40 TAC §711.201

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC, Chapter 48, Subchapters F, H, and I.

§711.201. What is your duty to report if you are an employee, agent, or contractor of a facility, local authority, community center, or HCSW?

If you know or suspect that a person served is being or has been abused, neglected, or exploited or meets other criteria specified in §711.5(b) of this title (relating to What does APS investigate under this chapter?), you must:

(1) report such knowledge or suspicion to DFPS immediately, if possible, but in no case more than one hour after knowledge or suspicion by calling the DFPS toll-free number at 1-800-647-7418 or by use of the Internet at https://www.txabusehotline.org/notice-aps.asp;

(2) preserve and protect any evidence related to the allegation in accordance with instructions from DFPS; and

(3) cooperate with the investigator during the investigation.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800589
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: August 10, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER E. CONDUCTING THE INVESTIGATION

40 TAC §§711.401, 711.403, 711.405, 711.415, 711.417

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC, Chapter 48, Subchapters F, H, and I.

§711.401. Who and when does the investigator notify of an allegation and when is the identity of the reporter revealed?

(a) Except as provided in subsection (b) of this section, the investigator makes the following notifications, as appropriate:
Figure: 40 TAC §711.401(a)

(b) If the administrator or CEO is the alleged perpetrator, the investigator makes other notifications, in subsection (a) of this section, as appropriate, but instead of notifying the administrator or CEO:
Figure: 40 TAC §711.401(b)

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800590
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: August 10, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER G. RELEASE OF REPORT AND FINDINGS

40 TAC §§711.603, 711.605, 711.607, 711.611, 711.613

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC, Chapter 48, Subchapters F, H, and I.

§711.605. Who receives the investigative report?

(a) The investigator sends a copy of the investigative report to:

(1) the administrator, and when appropriate, the contractor CEO except as described in paragraph (4) of this subsection;

(2) Consumer Rights and Services, if the investigation involves an HCSW;

(3) local law enforcement if the investigation confirms that a person served has been abused, neglected, or exploited in a manner that constitutes a criminal offense under any law, including the Texas Penal Code, §22.04;

(4) the following, if the administrator or contractor CEO is the perpetrator or alleged perpetrator:

(A) State Hospitals--the Assistant Commissioner for Mental Health Substance Abuse Services, DSHS, Mail Code 2053, P.O. Box 12668, Austin, TX 78711-2668.

(B) State Schools/State Centers--the Director of State Schools, DADS, Mail Code W-511, P.O. Box 149030, Austin, TX 78714-9030.

(C) Community Centers and Local Authorities--the:

(i) Chair of the Community Center Board of Trustees or Local Authority Board of Directors;

(ii) Assistant Commissioner for Mental Health and Substance Abuse Services; and

(iii) Assistant Commissioner for Access & Intake, DADS, Mail Code W-350, P.O. Box 149030, Austin, TX 78714-9030.

(D) HCSW Programs--the HCSW CEO/Administrator Designee.

(E) Contractor CEO--the administrator; and

(5) the state office of Adult Protective Services if a confirmed finding is made against a physician, dentist, pharmacist, registered nurse, licensed vocational nurse, or other licensed professional. The state office forwards a copy of the report to the appropriate licensing authority.

(b) Law enforcement or a prosecutor may request that DFPS delay the release of the investigative report to anyone listed in subsection (a)(1) or (2) of this section, or may request that DFPS delay forwarding a copy of the report to the appropriate licensing authority.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800591
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: August 10, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER I. PROVISION OF SERVICES

40 TAC §711.801

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC, Chapter 48, Subchapters F, H, and I.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800592

Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: August 10, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER K. REQUESTING A REVIEW OF FINDING IF YOU ARE THE ADMINISTRATOR OR CONTRACTOR CEO

40 TAC §§711.1001 - 711.1003, 711.1005, 711.1007, 711.1009, 711.1011, 711.1013

The amendments and new section are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new section implement HRC, Chapter 48, Subchapters F, H, and I.

§711.1001. What if the administrator or contractor CEO wants to request a review of the finding or the methodology used to conduct the investigation?

(a) The administrator or contractor CEO may request a review of the finding or methodology used to conduct the investigation if he or she is not the perpetrator or alleged perpetrator.

(b) If the administrator is the perpetrator or alleged perpetrator, then the following may request a review:

(1) In facilities, the DADS or DSHS state office.

(2) In community centers and local authorities, the Chair of the Community Center Board of Trustees or the Chair of the Local Authority Board of Directors.

(3) In HCSW programs, the HCSW CEO/Administrator Designee.

(c) If the contractor CEO is the perpetrator or alleged perpetrator, then the administrator may request a review.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800593
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: August 10, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER M. REQUESTING AN APPEAL IF YOU ARE THE REPORTER, ALLEGED VICTIM, LEGAL GUARDIAN, OR WITH ADVOCACY, INCORPORATED

40 TAC §§711.1203, 711.1205, 711.1207

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC, Chapter 48, Subchapters F, H, and I.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800594
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: August 10, 2007
For further information, please call: (512) 438-3437

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40 TAC §711.1209

The repeal is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC, Chapter 48, Subchapters F, H, and I.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800595

Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: August 10, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER O. EMPLOYEE MISCONDUCT REGISTRY

40 TAC §§711.1401, 711.1405, 711.1407, 711.1411, 711.1413, 711.1415, 711.1417, 711.1419, 711.1421, 711.1425, 711.1427, 711.1429, 711.1431, 711.1433, 711.1435

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC, Chapter 48, Subchapters F, H, and I.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800596
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: August 10, 2007
For further information, please call: (512) 438-3437

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CHAPTER 745. LICENSING

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), new §745.461, with changes to the proposed text published in the November 2, 2007, issue of the *Texas Register* (32 TexReg 7869). The amendments to §§745.21, 745.37, 745.115, 745.129, 745.243, 745.301, 745.321, 745.341, 745.343, 745.435, 745.631, 745.8407, 745.9061, 745.9063, 745.9065, 745.9069, 745.9071, 745.9073, 745.9075, 745.9077, 745.9079, 745.9081, 745.9083, 745.9085, 745.9087, 745.9089, 745.9091,745.9097, and 745.9100; new §§745.429, 745.439, 745.463, 745.465, 745.467, 745.521, 745.523, 745.9060, 745.9067, 745.9068, 745.9070, 745.9090, 745.9092, 745.9093, 745.9094, 745.9095, and 745.9096; and the repeal of §§745.9067, 745.9093, 745.9095, and 745.9099, are adopted without changes to the proposed text and will not be republished. The justification for the amendments, new sections, and repeals is to update the rules to reflect changes in the 80th Legislative Session. Changes include: (1) conforming the social study rules with the new legislation, including the minimum qualifications to conduct social studies; (2) investigation of serious incident reports that pertains to a child under the age of six; (3) prohibits a person conducting an adoption home study from considering military membership as a negative factor in the adoption home study; (4) the issuance of a new type of permit to operate an employer-based day-care facility; and (5) exemptions from regulation for a food distribution program.

Section 745.21 adds employer-based child care to Licensing's definitions. Employer-based child care is excluded as a child-care facility, but included as an operation, in the rule. Its permit is called a compliance certificate.

Section 745.37 adds a description of an employer-based child care operation.

Section 745.129 adds an exemption for a food distribution program.

Section 745.243 adds a list of the materials required to apply for a permit to operate an employer-based child care.

Section 745.301 adds a 10-day time frame for Licensing staff to review and accept an application for a permit to operate an employer-based child care, or to return it because it is incomplete.

Section 745.321 adds that the decision to issue or deny a permit to an employer-based child care must be made no later than 30 days after we accept the application.

Section 745.341 adds employer-based child care to the list of those operations that receive a non-expiring permit.

Section 745.343 adds a reference to Division 10 in Subchapter D of Chapter 745 of this title (relating to Relocation of Operation) in order to include information about both a change in the ownership of an operation and a relocation of the operation.

New §745.429 provides direction for an employer-based child care that changes location, in order to establish a business process for this type of occurrence.

Section 745.435 reflects that a change in location for a child-placing agency (CPA) no longer automatically revokes the permit. A CPA that relocates will be processed as an amendment to the permit. The revisions include a time frame for a CPA to notify Licensing of its plan to relocate its operation.

New §745.439 provides direction for an employer-based operation that changes ownership, in order to establish a business process for this type of occurrence.

New §745.461 establishes parameters for a parent, with a child in care, to be in or out of the building where the employer-based child care is located.

New §745.463 establishes the qualifications and training of a caregiver at an employer-based child care.

New §745.465 requires an employer-based child care to report serious incidents to Licensing.

New §745.467 requires the permit holder to inform the employees in an employer-based child care of the duty to report suspected abuse, neglect, or exploitation.

New §745.521 establishes the Licensing fees required for an employer-based child care.

New §745.523 establishes the requirements for background checks for an employer-based child care.

Section 745.631 requires that a licensed center must complete background checks before issuance of a permit.

Section 745.8407 adds (1) requirements for Licensing staff to investigate an agency foster home; and (2) that an inspection will be conducted at an employer-based child care prior to issuance of a permit and as part of an investigation.

New §745.9060 defines a "social study." This term includes pre-adoptive social studies and post-placement adoptive social studies.

Section 745.9065 adds minimum qualifications to conduct an independent social study.

New §745.9067 instructs a person on how to assess situations, reach conclusions, and make recommendations when conducting social studies. Old §745.9067 is repealed because this rule is no longer pertinent.

New §745.9068 adds ethical requirements when conducting a social study, including communication with attorneys.

New §745.9070 prohibits a person conducting an adoption home study from considering military membership as a negative factor in the adoption home study.

Section 745.9073 changes the minimum age for interviewing a child living in the home from three years old to four years old. Other non-substantive language changes are also included.

New §745.9090 allows a combined pre-adoptive and post-placement adoptive study report when the child is already living in the prospective adoptive home.

New §§745.9092, 745.9093, 745.9094, 745.9095, and 745.9096 are adopted in new Division 4, Post-Placement Adoptive Social Study and Report, of Subchapter O, Independent Court-Ordered Social Studies. The rules repeat the requirements contained in new Division 3, Pre-Adoptive Social Studies, but they relate to post-placement adoptive social studies rather than pre-adoptive social studies. For clarity, rules in this subchapter are now separated by division, so some rules are repeated in both the division for pre-adoptive social studies and the division for post-placement adoptive social studies if the requirements of the rule apply to both types of social study. Old §§745.9093, 745.9095 and 745.9099 are repealed.

Minor, non-substantive changes are made to §§745.115, 745.9061, 745.9063, 745.9069, 745.9071, 745.9075, 745.9077, 745.9079, 745.9081, 745.9083, 745.9085, 745.9087, 745.9089, 745.9091, 745.9097, and 745.9100.

The sections will function by enhancing the health, safety, and welfare of children in day child-care and residential child-care and improving the quality of these operations. Some rules will provide more flexibility to operations that provide care for children needing emergency services, and therefore, provide solutions in case of emergency contingencies.

During the comment period, DFPS received comments from State Representative Michael Villarreal and two individuals. A summary of the comments and DFPS's responses follow:

Comment concerning §745.461: State Representative Villarreal disagreed with the eight hour weekly time limit for parents to be away from the work site. He encouraged DFPS to change the eight hour limit to ten hours in order to ensure that "implementation of House Bill 1385 better reflects the realities of work demands, while still requiring parents to spend sufficient time at the workplace to monitor their children."

Response: DFPS agrees, and is changing the eight hour limit to ten hours.

Comments concerning §745.9065: Two comments were received. One commenter misunderstood the rule change proposal, commenting on text marked for deletion. Another commenter confused legal requirements for the social study itself with legal requirements for the person conducting the social study.

Response: DFPS is adopting this section without change.

SUBCHAPTER A. PRECEDENCE AND DEFINITIONS

DIVISION 3. DEFINITIONS FOR LICENSING

40 TAC §745.21

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC, Chapter 42, Subchapter F.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800624
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER B. CHILD CARE AND OTHER OPERATIONS THAT WE REGULATE

40 TAC §745.37

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules

governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC, Chapter 42, Subchapter F.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800625
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER C. OPERATIONS THAT ARE EXEMPT FROM REGULATION
DIVISION 2. EXEMPTIONS FROM REGULATION

40 TAC §745.115, §745.129

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.041(b).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800626
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER D. APPLICATION PROCESS
DIVISION 3. SUBMITTING THE APPLICATION MATERIALS

40 TAC §745.243

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC, Chapter 42, Subchapter F.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800627
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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DIVISION 5. ACCEPTING OR RETURNING THE APPLICATION

40 TAC §745.301

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC, Chapter 42, Subchapter F.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800628
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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DIVISION 6. REVIEWING THE APPLICATION FOR COMPLIANCE WITH MINIMUM STANDARDS, RULES, AND STATUTES

40 TAC §745.321

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC, Chapter 42, Subchapter F.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800629
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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DIVISION 7. THE DECISION TO ISSUE OR DENY A PERMIT

40 TAC §745.341, §745.343

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC, Chapter 42, Subchapter F and §42.054.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800630
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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DIVISION 10. RELOCATION OF OPERATION

40 TAC §§745.429, 745.435, 745.439

The new sections and amendment are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections and amendment implement HRC, §42.048.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800631
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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DIVISION 11. EMPLOYER-BASED CHILD CARE

40 TAC §§745.461, 745.463, 745.465, 745.467

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC, Chapter 42, Subchapter F, and §42.155.

§745.461. Does a parent have to be at the work site when their child is in care?

A parent must:

(1) Work within the same building in which the child care is located;

(2) Routinely be present at the work site for the majority of the time the child is in care;

(3) Be physically accessible to the child, although a parent may be away from the building for a limited period for lunch, a business meeting, doctor appointment, or to attend training; and

(4) A parent may not be away from the building for more than four hours in a day or for more than ten hours in a week.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800632
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER E. FEES

40 TAC §745.521, §745.523

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC §42.054.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800633
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER F. BACKGROUND CHECKS

DIVISION 2. REQUESTING BACKGROUND CHECKS

40 TAC §745.631

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC, §42.056.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800634
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER K. INSPECTIONS AND INVESTIGATIONS

DIVISION 1. OVERVIEW OF INSPECTIONS AND INVESTIGATIONS

40 TAC §745.8407

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC, Chapter 42, Subchapter F, and §42.044.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800635

Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER O. INDEPENDENT PRE-ADOPTIVE HOME SCREENING AND INDEPENDENT POST-PLACEMENT ADOPTIVE REPORT

40 TAC §§745.9067, 745.9093, 745.9095, 745.9099

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement the Family Code, §107.0513(c), (e) and (f).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800636
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER O. INDEPENDENT COURT-ORDERED SOCIAL STUDIES

DIVISION 1. DEFINITIONS

40 TAC §§745.9060, 745.9061, 745.9063

The new section and amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section and amendments implement the Family Code, §107.050.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800637
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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DIVISION 2. MINIMUM QUALIFICATIONS AND OTHER REQUIREMENTS

40 TAC §§745.9065, 745.9067, 745.9068

The amendment and new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment and new sections implement the Family Code, §107.0511.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800638
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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DIVISION 3. PRE-ADOPTIVE SOCIAL STUDIES

40 TAC §§745.9069 - 745.9071, 745.9073, 745.9075, 745.9077, 745.9079, 745.9081, 745.9083, 745.9085, 745.9087, 745.9089, 745.9090

The amendments and new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code

§531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new sections implement the Family Code, Chapter 107.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800639
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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DIVISION 4. POST-PLACEMENT ADOPTIVE SOCIAL STUDY AND REPORT

40 TAC §§745.9091 - 745.9097

The amendments and new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new sections implement the Family Code §107.052(b).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800640
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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DIVISION 5. COMPLAINTS

40 TAC §745.9100

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements the Family Code, §107.0519(f) and §107.052(b).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800641
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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CHAPTER 746. MINIMUM STANDARDS FOR CHILD-CARE CENTERS

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§746.201, 746.611, and 746.1311, without changes to the proposed text published in the November 2, 2007, issue of the *Texas Register* (32 TexReg 7881). The justification for the amendments is to ensure that child-care operations provide inclusive care to children with special needs. Enforcement of federal laws lies with the U.S. Department of Justice, Civil Rights Division.

Section 746.201 is revised to require permit holders to report any substantive Department of Justice (DOJ) complaints about Title III of the Americans with Disabilities (ADA) Act to DFPS. Currently, there is not a requirement for permit holders to report DOJ Title III complaints to DFPS.

Section 746.611 is revised to delete the word "physically" from the description of a health statement. The current rule describes a health statement as a written statement from a health-care professional who has examined the child within the past year, indicating the child is "physically" able to take part in the child-care program.

Section 746.1311 is revised to include an additional topic, related to serving children with special care needs, to the annual training requirements for directors.

The amendments will function by promoting awareness of the Americans with Disabilities Act.

During the public comment period, DFPS received comments from the Texas Council for Developmental Disabilities, The Arc of Texas, the Disability Policy Consortium, and 59 individuals. A summary of the comments and DFPS's responses follow:

Comments concerning §746.201:

(1) Fifty-two commenters generally were in favor of the rule change, stating the proposed changes are a step in the right direction. The majority of these commenters suggested the rule should require that a child-care provider tell DFPS when they deny services to a child because of their disability.

Response: Failure to report will be a violation of the minimum standard rule. Regarding the suggestion that the standard require the providers to tell DFPS when they deny services to a child because of their disability, DFPS maintains that neither the provider nor DFPS will necessarily be in position to know whether the denial of services would be due to a "disability" as defined in the ADA. Hence, the DOJ or another entity responsible for the enforcement of the ADA should first be involved to determine the validity of a complaint that an operation has violated the ADA. DFPS is not making changes as a result of the comment.

(2) One commenter stated the proposed rule change will require extra staff to supervise children with disabilities and providers are losing their ability to serve children as a result of this.

Response: The rule change does not require additional staff or changes to the child/caregiver ratio. Supervision needs for children vary based on many factors including ages of children, their individual differences and abilities, and the layout and location of the operation. DFPS is not making changes as a result of the comment.

(3) One commenter stated instead, modify the rule to include unsubstantiated claims that have clear points and would reasonably be thought to be substantiated by the DOJ pending their process. The same commenter suggested adding a rule that would quantify what a "fair assessment" and "reasonable accommodation" means and provide a method of accomplishing it (such as a standardized form).

Response: DFPS agrees that the DOJ process is complicated and lengthy, however Licensing staff does not have the expertise to determine a "reasonable" complaint nor would it be able to take any action based on such information. The jurisdiction and expertise for these judgments lie outside Licensing. DFPS is not making changes as a result of the comment.

(4) One commenter stated the rule will have no meaningful impact because there is no specific resulting penalty or remedy or proposed policy change to alert monitors if a provider did not report a substantiated claim. The same commenter also stated the rule should require a provider to document that a service was denied (to a child with a disability), because the provider would have to substantially alter their program to serve the child in question, and require the provider to notify the parent, including the reason for denial.

Response: Failure to report will be a violation of the minimum standard rule. Any minimum standards violation is documented and may be established as a part of a pattern of noncompliance significant enough to be the basis of remedial action against the operation's permit. Duplicating the DOJ role to any great degree is unprecedented and not recommended by various organizations, including Advocacy Inc. and the Governor's Office on People with Disabilities. The enforcement entities have the authority to seek remedies against an operation that has violated the ADA. DFPS is not making changes as a result of the comment.

(5) One commenter stated while the rule change takes great strides at holding providers accountable for substantiated violations, the rule should require child-care providers to report any DOJ complaints being investigated. The same commenter also stated even with the proposed change, the rule continues to inadequately address the issue of the continued denial of child-care services to children with disabilities. A DOJ complaint is a very lengthy process which can take up to a year or more to substantiate a case. The DOJ may choose to not pursue a complaint thus leaving children with disabilities with limited or no options for child-care services.

Response: As DFPS does not have the expertise to enforce the ADA, there would be no practical purpose for an operation to report an unsubstantiated complaint to DFPS. But DFPS is very interested in knowing that an entity with that expertise has determined an operation has violated the ADA. DFPS is aware that litigation involving most subject matters is a lengthy process. DFPS believes that the process will still be more expeditious if an entity with ADA expertise is enforcing this very important body of laws. DFPS is not making changes as a result of the comments.

(6) Four commenters gave an account of their hardship due to the lack of child care for children with disabilities.

Response: DFPS is aware of this type of hardship and hopes that this minimum standards rule change will promote compliance with the ADA.

Comments concerning §746.611:

(1) Seven commenters support the proposed rule change. One commenter stated the proposed rule change is a step in the right direction.

Response: DFPS acknowledges and appreciates the comments.

(2) One commenter stated instead of removing the word "physical" in regards to participating in activities, add the phrase "to the extent the child is capable of". This shows inclusion at the level best for the child.

Response: The purpose of this standard is for the parent to provide a health statement, at enrollment, stating a child can safely participate in group child care. A health statement ensures the individual needs of children are met, while protecting the health and safety of all the children in care. DFPS is not making changes as a result of the comment.

(3) One commenter stated the actual effect will be for child-care centers to avoid providing services to children and cease provision of those services now currently provided.

Response: The change does not present a fiscal impact. Obtaining a health statement from a health-care professional is not a new requirement. DFPS is not making changes as a result of the comment.

(4) One commenter stated the assertion that this provision will not have fiscal implication for the state of Texas is extremely impossible. The same commenter stated the removal of the word "physically" infers that medical providers must now make a psychological evaluation of a child.

Response: DFPS disagrees that this change will have a fiscal impact or that a written statement from a health-care professional

infers the necessity of a psychological evaluation of the child. DFPS is not making changes as a result of the comment.

(5) One commenter stated opposition to the proposed changes as well as the current rule.

Response: This comment included no specific complaint to which DFPS can respond.

Comments concerning §746.1311:

(1) Fifty-three commenters support the proposed rule changes. Commenters stated changes are a move in the right direction. Another commenter stated the training for staff is a great idea. Commenters agreed the rule should include training requirements for child-care providers to improve access to child care and compliance with the ADA.

Response: The training requirements stated in the current rule include care for children with special needs as an optional annual training topic for caregivers. DFPS is not making changes as a result of the comment.

(2) One commenter stated the State is creating more paperwork. The same commenter also stated there is no way the state is going to enforce any of these rules.

Response: DFPS proposes rules with the full intent of enforcing them. DFPS is not making changes as a result of the comment.

(3) One commenter stated by not having the special care needs training every year it could be treated by certain plaintiff's counsel as failure to meet a duty of care for developmentally-impaired children.

Response: The rule change adds a fifth optional topic to the annual training requirements for child-care director in support of inclusive child care. This rule does not preclude an operation from seeking any additional training beyond the requirements of this minimum standard. DFPS is not making changes as a result of the comment.

(4) One commenter suggested adding some type of additional certification to identify inclusive child-care centers for parents.

Response: DPFS' Texas Child Care Search allows parents to search for child-care operations matching certain criteria such as care for children with special needs. DFPS is not making changes as a result of the comment.

SUBCHAPTER B. ADMINISTRATION AND COMMUNICATION
DIVISION 1. PERMIT HOLDER RESPONSIBILITIES

40 TAC §746.201

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements Human Resources Code §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800585
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER C. RECORD KEEPING
DIVISION 1. RECORDS OF CHILDREN

40 TAC §746.611

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements Human Resources Code §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800586
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER D. PERSONNEL
DIVISION 4. PROFESSIONAL DEVELOPMENT

40 TAC §746.1311

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC

§40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements Human Resources Code §42.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800587
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER R. HEALTH PRACTICES
DIVISION 1. ENVIRONMENTAL HEALTH

40 TAC §746.3427

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), an amendment to §746.3427, without changes to the proposed text as published in the November 2, 2007, issue of the *Texas Register* (32 TexReg 7883).

The justification for the amendment is to also reference the Texas Department of Agriculture, because the Texas Structural Pest Control Board has been transferred to the Texas Department of Agriculture, as required by House Bill 2458 of the 80th Legislature.

The amendment will function by ensuring that the health, safety, and welfare of children in child-care will be enhanced and the quality of these operations will improve.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements Chapter 1951 of the Occupations Code, and HRC §42.042(a).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800642
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General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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CHAPTER 748. GENERAL RESIDENTIAL OPERATIONS AND RESIDENTIAL TREATMENT CENTERS

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§748.103, 748.109, 748.1203, and 748.3019, without changes to the proposed text as published in the November 2, 2007, issue of the *Texas Register* (32 TexReg 7884).

The justification for the amendments is to reflect changes in the 80th Legislative Session.

Sections 748.103, 748.109, and 748.1203 are revised to allow a residential facility providing emergency care services to go over its licensed capacity for 48 hours.

Section 748.3019 is revised to reference the Texas Department of Agriculture, because the Texas Structural Pest Control Board is transferred to the Texas Department of Agriculture, as required by House Bill 2458 of the 80th Legislature.

The amendments will function by ensuring that the health, safety, and welfare of children in residential child-care will be enhanced and the quality of these operations will improve. Some rules will provide more flexibility to operations that provide care for children needing emergency services, and therefore, provide solutions in case of emergency contingencies.

No comments were received regarding adoption of the amendments.

SUBCHAPTER C. ORGANIZATION AND ADMINISTRATION
DIVISION 1. PERMIT HOLDER RESPONSIBILITIES

40 TAC §748.103, §748.109

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042(a) and (r).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800643
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER I. ADMISSION, SERVICE PLANNING, AND DISCHARGE
DIVISION 1. ADMISSION

40 TAC §748.1203

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042(a) and (r).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800644
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER O. SAFETY AND EMERGENCY PRACTICES
DIVISION 1. SANITATION AND HEALTH PRACTICES

40 TAC §748.3019

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements Occupations Code, Chapter 1951 and HRC §42.042(a).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800645
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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CHAPTER 749. CHILD-PLACING AGENCIES

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§749.103, 749.2445, 749.2447, 749.2473, 749.2475, 749.2489, 749.2961, 749.2967; and new §749.3624, in its Child-Placing Agencies chapter. The amendments to §749.2475 and §749.2489 are adopted with changes to the proposed text published in the November 2, 2007, issue of the *Texas Register* (32 TexReg 7885). The amendments to §§749.103, 749.2445, 749.2447, 749.2473, 749.2961, 749.2967; and new §749.3624 are adopted without changes to the proposed text and will not be republished. The justification for the amendments and new section is to update the rules to reflect changes in the 80th Legislative Session. Changes include: (1) eliminating DFPS's restrictions on foster parents possession of firearms, while adding rules on safety and proper storage of firearms and ammunition; (2) obtaining law enforcement family violence information before issuing a license or verifying a foster home; (3) not considering military membership when conducting an adoption home study; (4) a verified agency foster home transfer process, notifications on Licensing violations, and past citations; and (5) a change in the location of a child-placing agency no longer automatically revokes the permit.

Section 749.103 is revised to allow a child-placing agency to change location without having to apply for a new license. The rule is amended to include a requirement that the child-placing agency notify Licensing of a change in location prior to the move.

Section 749.2445 adds the requirement that the child-placing agency submit to Licensing any family violence information obtained on a prospective foster home, regardless of whether the child-placing agency decides to verify the home.

Section 749.2447 is revised to require a child-placing agency to obtain information from a potential foster home about family vi-

olence reports at the home to which a law enforcement agency has responded during the previous 12 months. The revision also requires the child-placing agency to follow up with the appropriate law enforcement agency if any incidents are disclosed.

Section 749.2473 is revised to increase the requirements related to a foster home that transfers from one child-placing agency to another. The agency seeking to verify the home must send a written request for transfer to the agency that currently verifies the home.

Section 749.2475 is revised to increase the requirements related to a foster home that transfers from one child-placing agency to another. The child-placing agency must request the following when verifying the transferring foster home: any corrective action plan(s), an annual development plan, or a description of any imposed or potential service limitations related to the foster home. The revision also adds the requirement that a child-placing agency release background information on a foster home to a second child-placing agency as soon as the first agency becomes aware of the foster home's intent to transfer to the second agency.

Section 749.2489 is revised to increase the information that a child-placing agency must report regarding closure of a foster home. This rule is amended to include the additionally required information, which is the reason for the closure and a contact person. The rule is also revised to add the requirement that child-placing agencies report to Licensing the denial of a foster home verification and the reason for the denial.

Section 749.2961 is revised to delete the paragraph that prohibits firearm possession if the foster home provides treatment services. Storage requirements are being added to this rule based on storage requirements already in effect in other states. Specifically, the following is being added: (1) locked storage must be made of unbreakable material; (2) locked storage with a glass front or enclosure must have guns secured with a locked cable or chain through the trigger guards; and (3) firearms which are inoperable and solely ornamental are exempt from storage requirements.

Section 749.2967 is revised to clarify that a caregiver can now transport a child with legal firearms that are not loaded and inaccessible to the child.

New §749.3624 is added to prohibit a person conducting an adoption home study from considering military membership as a negative factor in the home study.

The amendments and new section will function by enhancing the health, safety, and welfare of children in residential child-care and improving the quality of these operations. Some rules will provide more flexibility to operations that provide care for children needing emergency services, and therefore, provide solutions in case of emergency contingencies.

During the comment period, DFPS received comments from The Texas Alliance of Child and Family Services and two individuals. A summary of the comments and DFPS's responses follow:

Comments concerning §749.2445 and §749.2447: The commenter did not express concern about the rules, but instead offered suggestions about rule implementation.

Response: DFPS is adopting the sections without change.

Comments concerning §749.2475: DFPS received three comments.

(1) One commenter suggested that background check information should be shared between CPAs when a foster home transfers.

Response: While staff believe this is a laudable suggestion, there are too many legal issues related to the sharing of background information (i.e. criminal background and central registry information) between CPAs. DFPS is not making changes as a result of this comment.

(2) Two other commenters expressed concern about the proposed requirement that a CPA share background information on a verified foster home as soon as the CPA became aware of the foster home's intent to transfer to another CPA.

Response: Staff agree with this comment and the language is changed accordingly.

Comment concerning §749.2489: One commenter disagreed with the proposed requirement to report foster home verification denials.

Response: Staff agree in part and disagree in part with this commenter. The information regarding the closing of a foster home is required by the new legislation. However, requiring the submittal of verification denials is not required in the legislation, and there are many legal issues related to the release and further sharing of personal and sometimes confidential information. The rule has been changed accordingly.

SUBCHAPTER C. ORGANIZATION AND ADMINISTRATION

DIVISION 1. PERMIT HOLDER RESPONSIBILITIES

40 TAC §749.103

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042(a) and §42.048(e).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800646
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER M. FOSTER HOMES: SCREENINGS AND VERIFICATIONS
DIVISION 2. FOSTER HOME SCREENINGS

40 TAC §749.2445, §749.2447

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042(a) and §42.0561.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800647
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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DIVISION 3. VERIFICATION OF FOSTER HOMES

40 TAC §§749.2473, 749.2475, 749.2489

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §§42.042(a), 42.0535(e) and 42.0536.

§749.2475. To whom must I release information regarding a family on which I previously conducted a foster home screening, pre-adoptive home screening, post placement adoptive report, or home study?

(a) If background information is requested by a child-placing agency conducting a foster home screening, pre-adoptive home screening, post placement adoptive report, or home study, then you must release any background information you have acquired through a previous foster home screening, pre-adoptive home screening, post placement adoptive report, or home study.

(b) Background information must also be released to independent contractors who are hired or required by the court to conduct a social study under Chapter 107 of the Texas Family Code.

(c) You must release the background information to the requesting agency within 10 days after receiving the written request, including generally informing the requesting agency of any unresolved investigations and/or deficiencies. After the resolution of the investigations and/or deficiencies, you must release the remaining background information to the requesting agency within 10 days after the resolution of the investigations and/or deficiencies.

(d) Background information is any information that must be obtained by §749.2447(23) of this title (relating to What information must I obtain for the foster home screening?). In addition to the items noted in §749.2447(23), the background information for a transferring foster home must also include, if applicable:

(1) An annual development plan;

(2) Any corrective action plan(s); and

(3) A description of any imposed or potential service limitation.

§749.2489. What information must I submit to Licensing about a foster home's verification status?

You must submit information to us within two working days of:

(1) Verifying a new foster home;

(2) Temporary verification of a foster home and when the verification is not longer temporary;

(3) Putting a foster home on inactive status or taking a foster home off of inactive status;

(4) Changing conditions of the verification for an existing home; or

(5) Closing a foster home, including:

(A) The reason the foster home closed; and

(B) The name and contact information of a person at your agency who may be contacted by another child-placing agency to obtain records relating to the closed foster home.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800648
Gerry Williams
General Counsel
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Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER O. FOSTER HOMES: HEALTH AND SAFETY REQUIREMENTS, ENVIRONMENT, SPACE AND EQUIPMENT

DIVISION 3. WEAPONS, FIREARMS, EXPLOSIVE MATERIALS, AND PROJECTILES

40 TAC §749.2961, §749.2967

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042(a) and (e-1).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800649
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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SUBCHAPTER S. ADOPTION SERVICES: ADOPTIVE PARENTS
DIVISION 2. PRE-ADOPTIVE HOME SCREENING

40 TAC §749.3624

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements the Family Code, §162.0025.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800650
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: March 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 438-3437

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 31. PUBLIC TRANSPORTATION

The Texas Department of Transportation (department) adopts amendments to §31.1, Scope and Purpose, §31.2, Organization, §31.3, Definitions, §31.11, Formula Program, §31.16, Section 5309 Grant Program, §31.17, Section 5316 Grant Program, §31.18, Section 5317 Grant Program, §31.21, Section 5303 Grant Program, §31.22, Section 5313 Grant Program, §31.26, Section 5307 Grant Program, §31.31, Section 5310 Grant Program, §31.36, Section 5311 Grant Program, §31.37, Rural Transit Assistance Program, §31.40, Public Involvement, §31.41, Private Sector Participation, §31.42, Standard Federal Requirements, §31.43, Contracting Requirements, §31.44, Procurement Requirements, §31.47, Audit and Project Close-Out Standards, §31.48, Project Oversight, §31.53, Maintenance Requirements, and §31.57, Disposition, all concerning public transportation. Sections 31.17, 31.18 and 31.42 are adopted with changes to the proposed text as published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8751). Sections 31.1 - 31.3, 31.11, 31.16, 31.21, 31.22, 31.26, 31.31, 31.36, 31.37, 31.40, 31.41, 31.43, 31.44, 31.47, 31.48, 31.53 and 31.57 are adopted without changes and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

In recent months, the Federal Transit Administration (FTA) undertook an analysis and review of its regulations to eliminate duplication and unnecessary requirements, to update and clarify its rules, and to bring them into conformity with the new federal statute, Safe, Accountable, Flexible, Efficient, Transportation Equity Act: A Legacy for Users, (SAFETEA-LU) (Pub. L. 109-59, 119 Stat. 1144, August 10, 2005).

The amendments align text with updates made by FTA and SAFETEA-LU. Changes in language are also made to enhance readability and clarity, to improve grammar, to update citations, and to be consistent with the Code Construction Act, Government Code, Chapter 311.

Amendments to §31.1, Scope and Purpose, add references to Transportation Code, Chapters 458 and 461 to accurately reflect the statutes that provide the authority for 43 TAC Chapter 31.

Amendments to §31.2, Organization, add paragraph (10) to list the additional responsibilities of the department to encourage the coordination of public transportation services to eliminate waste, to generate efficiencies that will permit increased levels of service, and to further the state's efforts to reduce air pollution. This new responsibility is mandated by Transportation Code, Chapter 461.

Amendments to §31.3, Definitions, clarify and expand existing definitions and conform definitions more closely to existing practice, federal standards, and state law.

Amendments to §31.3(3), Authority, add coordinated county authority to the list of agencies to bring the term into alignment with state statute and its use within 43 TAC Chapter 31.

Amendments to §31.3(7), Common rule, bring the term into alignment with federal regulations by adding 49 CFR Part 19 as it applies to grants given to institutions of higher education, hospitals, and other non-profit organizations.

Amendments to §31.3(8), Contractor, adds "or grant agreement" to correspond to the terminology used within 43 TAC Chapter 31.

New §31.3(19), "Farebox revenues", is added to align with the terminology used in federal regulations and replaces former definition "Revenue" at §31.3(62).

Subsequent paragraphs are renumbered.

Amendments to §31.3(34), Local governmental entity, add coordinated county authority to the list of agencies to bring the term in alignment with its use within 43 TAC Chapter 31 and to comply with Transportation Code, Chapter 457.

Amendments to §31.3(38), Mobility management, delete "Chapter 5300 et.seq" and replace it with "Section 5301 et seq." to correctly reference the federal statute and conform to language in SAFETEA-LU.

Amendments to §31.3(40), Net operating expenses, is amended by replacing "operating revenues" with "farebox revenues" to correspond with the renaming of "revenues" to "farebox revenues" in definition §31.3(19).

Amendments to §31.3(45), Obligated funds, adds "or grant agreement" to correspond to the terminology used within 43 TAC Chapter 31.

Amendments to §31.3(52), Public transportation, add language to mirror the definition of the term as used in state statute, Transportation Code, Chapter 461, and bring the term into alignment with its use within 43 TAC Chapter 31.

Section 31.3(62), Revenues, is deleted as the term has been renamed "Farebox revenue" and is defined at §31.3(19).

Section 31.3(65), Ridesharing activities, is deleted as the term is outdated. Due to rapidly changing technology and innovation in, as well as the economics of, the transit industry, this industry term no longer needs to be defined so specifically.

Subsequent paragraphs are renumbered.

New §31.3(75), U.S. DOT, is added to define the acronym U.S. DOT as the United States Department of Transportation. This acronym is used extensively throughout 43 TAC Chapter 31.

Amendments to §31.11(b)(1) and (2) delete outdated references to fiscal year 2007.

Amendments to §31.11(g), Application, deletes an obsolete reference to a federal statute.

Amendments to §31.16(a), Purpose, change the citation to accurately reference the provision of the Federal Transit Act to which the section applies and add the acronym U.S. DOT. Additionally, the amendments delete the reference to loans because loans are no longer authorized under Section 5309 of the Federal Transit Act.

Amendments to §31.16(d), Local share requirements, reflect tapered federal match as allowed by SAFETEA-LU and update the term "toll credits" to "transportation development credits" as renamed by SAFETEA-LU.

Amendments to §31.17(a), Purpose, change the citation to accurately reference the provision of the Federal Transit Act to which the section applies and add the acronym U.S. DOT.

Amendments to §31.17(e), Eligible subrecipients, add private for-profit operators as eligible recipients of funds to subsection (e)(1) and delete subsection (e)(2). Section 31.17 was adopted prior to the FTA issuing a federal circular for this program and as such, subsection (e)(2) was drafted specifically to address private for-profit operators. With the issuance of the federal circular for the Job Access Reverse Commute (JARC) program, subsection (e)(2) is no longer needed. Subsection (e)(3) is renumbered.

Amendments to §31.17(f)(2)(A) and (B) delete the reference to federal circular 9030.1C in §31.17(f)(2)(A) and, in §31.17(f)(2)(B), delete that reference and replace it with 9050.1. With the issuance of a federal circular for the JARC program, the former references are no longer valid.

Amendments to §31.17(j)(3) change that provision to mirror the language set forth in SAFETEA-LU regarding the transfer of funds between urbanized and nonurbanized categories within the JARC program. Due to these amendments, §31.17(j)(4) is deleted because it is no longer needed. Subsequent paragraphs are renumbered.

Amendments to §31.17(m), Incidental vehicle use, change the provision to reflect the most recent guidance issued by FTA in the recently issued federal circular 9050.1 and align the language with other programs in 43 TAC Chapter 31 having the same federal provision basis.

Amendments to §31.18(a), Purpose, change the citation to accurately reference the provision of the Federal Transit Act to which this section applies and add the acronym U.S. DOT.

Amendments to §31.18(e), Eligible subrecipients, add private for-profit operators as eligible recipients of funds to subsection (e)(1) and delete subsection (e)(2). Section 31.18 was adopted prior to the FTA issuing a federal circular for this program and as such, subsection (e)(2) was drafted specifically to address private for-profit operators. With the issuance of the federal circular for the New Freedom program, subsection (e)(2) is no longer needed. Subsection (e)(3) is renumbered.

Amendments to §31.18(f)(2)(A) delete the reference to federal circular 9070.1E and, in §31.18(f)(2)(B), delete that reference and replace it with 9045.1. With the issuance of a federal circular for the New Freedom program, the former references are no longer valid.

Amendments to §31.18(m), Incidental vehicle use, change that provision to reflect the most recent guidance as issued by FTA in the recently issued federal circular 9045.1 and aligns the language with other programs in 43 TAC Chapter 31 having the same federal provision basis.

Amendments to §31.21(a), Purpose, change the citation to accurately reference the provision of the Federal Transit Act to which this section applies and add the acronym U.S. DOT. This section is also amended to reflect changes in SAFETEA-LU regarding the federal statutory sections that govern the authorization and apportionment of funds.

Amendments to §31.21(c)(2) change that provision to reflect the change in codification of the planning program from 49 U.S.C. §5313 to 49 U.S.C. §5304.

Amendments to §31.21(d), Local share requirements, clarify that U.S. DOT funds are not eligible as local match for this program.

Amendments to §31.22(a), Purpose, change the citation to accurately reference the provision of the Federal Transit Act to which this section applies and add the acronym U.S. DOT.

Amendments to §31.22(b) and (c) change the citations to federal provisions to reflect the change in codification of the planning program from 49 U.S.C. §5313 to 49 U.S.C. §5304.

Amendments to §31.22(c), Local share requirements, align the provision with federal regulations to allow a lower match requirement as authorized in FTA Circular 8200.1 and clarify that U.S. DOT funds are not eligible as local match for this program.

Amendments to §31.26(e)(1) change the reference to the paragraphs that provide an exception to the general rule due to the deletion of paragraph (5). Paragraph (5) is deleted because it refers to federal fiscal years 2003 and 2004 and is obsolete.

Amendments to §31.31(a), Purpose, change the citation to accurately reference the provision of the Federal Transit Act to which this section applies, add the acronym U.S. DOT, and add the word "individuals" to better describe the population to whom §31.31 applies.

Amendments to §31.31(b), Goal and objectives, substitutes "individuals" for "persons" to better describe the population to whom this section applies. The amendments to §31.31(b)(4) delete the reference to performance goals and management objectives. The requirement of performance goals and management objectives for this program was removed in a previous rulemaking, however, this particular reference was inadvertently overlooked and is now being deleted.

Amendments to §31.31(e)(1) delete the word "will" and replace it with "may" to reflect the flexibility in programming of federal funds for state administrative expenses. This paragraph is also amended to delete the requirement of a federal match and clarify the non-federal match in alignment with provisions of SAFETEA-LU.

Amendments to §31.31(e)(2)(A) add clause (xvi) to add mobility management and coordination programs as an eligible capital expense in alignment with provisions of SAFETEA-LU and federal regulations.

Amendments to §31.31(e)(2)(C) align the provision with federal regulations to allow a lower match requirement as authorized by SAFETEA-LU and FTA Circular 9070.1F. This subsection is also amended to reflect the most current edition of the FTA federal circular.

Amendments to §31.31(f), Local share requirements, deletes a cross-reference which is no longer needed as a result of deleting the referenced language in the previous section.

Amendments to §31.31(g), (h), and (j) add the word individuals to better describe the population to whom the section applies.

Amendments to §31.31(k), Program of projects, change the reference in this subsection to reflect the most current edition of the FTA federal circular.

Amendments to §31.31(m), Meal delivery, change the subsection title and reflect the most recent guidance as issued by FTA in the revised federal circular 9070.1F, aligning the language with other programs in 43 TAC Chapter 31 that have the same federal provision basis.

Amendments to §31.36(a), Purpose, change the citation to accurately reference the provision of the Federal Transit Act to which the section applies and add the acronym U.S. DOT.

Amendments to §31.36(e)(2)(A) add new subclauses (xx) and (xxi) to add mobility management and crime prevention and security as eligible capital expenses in alignment with provisions of SAFETEA-LU and federal regulations.

Amendments to §31.36(e)(2)(C), (e)(3), and (e)(4) change these provisions to align them with federal regulations to allow a lower match requirement as authorized by SAFETEA-LU and FTA Circular 9040.1F.

Amendments to §31.36(f), Local share requirements, delete the requirement that local funds must be from sources other than unrestricted federal funds. This deletion brings this section into alignment with federal regulation which does not restrict the local sources.

Amendments to §31.36(g), Allocation of funds, change the provision to reflect the most current edition of the FTA federal circular, add the acronym U.S. DOT, and delete outdated references to fiscal year 2007.

Amendments to §31.37, Rural Transit Assistance Program, change the section name "Rural Transit Assistance Program" to "Rural Transportation Assistance Program" to align with SAFETEA-LU.

Amendments to §31.40, Public Involvement, change the section to reflect a change in the CFR number as a result of federal rulemaking implementing SAFETEA-LU changes. Similarly, the program sections referenced in new paragraphs (1) - (6) detail the established programs within SAFETEA-LU that call for public involvement in the planning requirements. The existing requirement of annual FTA certifications and assurance is moved to new paragraph (6).

Amendments to §31.41, Private Sector Participation, correct an omission in the current section by adding a reference to 49 U.S.C. §5306, which addresses private sector participation in the metropolitan planning process supported by 49 U.S.C. §5303 funds, and reflect wording changes in SAFTEA-LU.

Amendments to §31.42(a), Purpose, delete the term "recipient" and replace it with a more detailed phrase describing those grantees to whom this section applies. Changes are made in §31.42(a)(3) and (4) to reflect program name changes by SAFETEA-LU. An update §31.42(a)(6) is made by replacing Section 5313 with Section 5304 to reflect the change in the federal section that refers to the State Planning and Research program. Lastly, this section is amended by adding the two newest FTA programs authorized by SAFETEA-LU: the Job Access and Reverse Commute and New Freedom programs.

Amendments to §31.42(b), Requirements, change the subsection to provide a comprehensive list of the current federal statutes and regulations that apply to programs funded under the Federal Transit Act and administered through the department.

Amendments to §31.43(c), Subcontracts, replaces the word "contract" with the word "grant" to be consistent with how the department describes the mechanism by which funds are granted. Updating to the term grant also better distinguishes

what is being described in this section as the term contract is frequently used with different meanings.

Amendments to §31.44(b)(3) align the records retention period with that currently used by the department. This change will allow better tracking of assets as recent events have determined that information regarding a procurement activity is needed far longer than three years after procurement. Maintaining procurement information for the life of an asset plus an additional three years will provide valuable information when a determination must be made regarding the disposition, transfer, or other handling of an asset.

Amendments to §31.47(b)(3) clarify the starting point for retaining records. As one of the funding partners in a project, the department may, and at times does, issue its final payment on a project prior to project completion. The revised text clarifies that record retention begins upon grant close-out, not final payment.

New §31.47(b)(3)(D) is added to qualify that procurement record retention is not covered under this section. A cross-reference to the procurement section is also added to clarify that procurement record retention for capital projects has a different retention period as addressed under §31.44.

Amendments to §31.48(a), Purpose, clarify that this section applies to designated recipients and subrecipients.

Amendments to §31.48(b)(5) delete specific references to certain FTA programs. Text is added to clarify that all designated recipients, as well as subrecipients, are required to submit operations reports as required by federal and state statute.

New §31.48(b)(5)(A) reflects changes brought about by SAFETEA-LU requiring reporting of rural information to the National Transit Database. Subsequent subparagraphs are relettered.

Amendments to §31.48(b)(7) delete the reference to an obsolete TAC section.

Amendments to §31.48(c), Department monitoring, make changes to better describe the action needed to comply with the rules. Examples of how communication may be conducted include, but are not limited to, discussions at conferences, training venues, teleconferences, phone, email, workshops or written correspondence.

Amendments to §31.48(c)(1) delete specific references to certain FTA programs as federal law dictates that all FTA funded public transportation providers comply with civil rights.

Amendments to §31.48(c)(2)(B) clarify which programs do and do not fall under FTA testing standards. With the two newest FTA programs, JARC and New Freedom, and with successes from regional coordination efforts which place multiple funding streams into a coordinated system, clarification is needed regarding those instances in which a transit provider does or does not fall under FTA drug and alcohol testing standards.

Amendments to §31.48(c)(5) change the section referenced from §31.53(c) to §31.53(d) due to relettering of §31.53.

Amendments to §31.48(c)(6), Incidental vehicle use, revise paragraph (6) to reflect the most recent guidance related to the use of vehicles purchased with applicable federal or state funds as issued by FTA in the revised federal circulars, aligning the language with other programs in 43 TAC Chapter 31 having the same federal provision basis.

Amendments to §31.48(d)(1) and (2) delete language regarding an appeals process to the Texas Transportation Commission (commission). The former language specified actions that are outside of the statutory responsibilities of the commission and inconsistent with current department practice. The department will respond to requests for review by simple notification and request from a subrecipient.

Amendments to §31.53(b), Real property, change the subsection title and clarify that this section also applies to facilities in accordance with current department practice.

Amendments to §31.53(c), Equipment, create a new §31.53(d), from the last sentence from subsection (c). This alteration is needed so that the provisions listed in §31.53(d) apply to real property and facilities in addition to equipment in accordance with federal regulations. Paragraph (3) of subsection 31.53(d), regarding provisions for accessible equipment, is restated as simply provisions for accessibility so that the phrase is generic to all applicable circumstances.

Amendments to §31.57(d)(1) and (2) correct federal statutory references and clarify that the department will consult with FTA if applicable.

The Public Transportation Advisory Committee met on January 11, 2008 to review the draft rules and by motion recommended to the commission that the amended rules be filed with the Office of the Secretary of State.

COMMENTS

No comments on the proposed amendments were received.

SUBCHAPTER A. GENERAL

43 TAC §§31.1 - 31.3

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 455, 456, 458, 460, and 461.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800567
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Effective date: February 21, 2008
Proposal publication date: November 30, 2007
For further information, please call: (512) 463-8683

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SUBCHAPTER B. STATE PROGRAMS

43 TAC §31.11

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 455, 456, 458, 460, and 461.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800568
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Effective date: February 21, 2008
Proposal publication date: November 30, 2007
For further information, please call: (512) 463-8683

♦ ♦ ♦

SUBCHAPTER C. FEDERAL PROGRAMS

43 TAC §§31.16 - 31.18, 31.21, 31.22, 31.26, 31.31, 31.36, 31.37

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 455, 456, 458, 460, and 461.

§31.17. Section 5316 Grant Program.

(a) Purpose. Section 5316, Federal Transit Act (49 USC §5316), authorizes the Secretary of the U.S. DOT to make grants for public transportation projects for access to jobs and reverse commute purposes. The commission has been designated by the governor to administer the Section 5316 program, known as the Job Access and Reverse Commute program, or JARC, in areas less than 200,000 population.

(b) Goal and objectives. The department's goal in administering the Section 5316 program is to promote the availability of public transportation services targeted to employment and employment-related transportation needs. To achieve this goal, the department's objectives are to:

(1) promote the development of employment transportation services throughout the state, in partnership with local officials, public and private non-profit agencies, and operators of public transportation services;

(2) fully integrate the Section 5316 program with other federal and state programs supporting public, employment, and human service transportation;

(3) foster the development of local, coordinated public and human service transportation service plans from which JARC projects are derived;

(4) support local economic development; and

(5) improve the efficiency and effectiveness of the Section 5316 program through the provision of technical assistance.

(c) Department role. The department acts as the designated recipient for Section 5316 funds apportioned to the state for all urbanized areas less than 200,000 population and all nonurbanized areas. The subrecipient shall retain control of daily operations.

(d) Project types.

(1) Job access projects include:

(A) financing the eligible costs of projects that provide public transportation services targeted to welfare recipients and eligible low-income individuals;

(B) promoting public transportation use by low-income workers, including the use of public transportation by workers with nontraditional work schedules;

(C) promoting the use of employer-provided transportation, including the transit pass benefit program under Section 132 of the Internal Revenue Code of 1986;

(D) supporting mobility management and coordination programs among public transportation providers and other human service agencies providing employment or employment-related transportation services; and

(E) otherwise facilitating or providing transportation for employment or employment-related purposes by welfare recipients and low income persons.

(2) Reverse commute projects include:

(A) subsidizing the costs associated with adding reverse commute bus, train, carpool, van routes, or service from urbanized areas and other than urbanized areas to suburban workplaces;

(B) subsidizing the purchase or lease by a nonprofit organization or public agency of a van or bus dedicated to shuttling employees from their residences to a suburban workplace;

(C) supporting mobility management and coordination programs among public transportation providers and other human service agencies providing employment or employment-related transportation services; and

(D) otherwise facilitating or providing public transportation services to suburban employment opportunities.

(e) Eligible subrecipients.

(1) State agencies, local governmental authorities, private nonprofit organizations, private for-profit operators, and operators of public transportation services are eligible to receive Section 5316 funds through the department.

(2) Applicants who are subrecipients of public transportation funds through another program administered by the department must be in good standing with the department as defined in §31.3 of this chapter.

(f) Eligible assistance categories.

(1) State administrative expenses. The department may use up to 10% of the annual federal apportionment for urbanized areas less than 200,000 population and nonurbanized areas to defray the expenses incurred for the planning and administration of the Section 5316 program. State administrative and technical assistance expenses do not require a non-federal match.

(2) Capital expenses.

(A) Eligible items are:

(i) buses, vans, or other paratransit vehicles, fare boxes, wheelchair lifts and restraints;

(ii) equipment for transporting bicycles on public transit vehicles;

(iii) radios and communication equipment;

(iv) equipment installation costs;

(v) vehicle procurement, testing, inspection, and acceptance costs;

(vi) preventive maintenance, including all maintenance costs;

(vii) vehicle rebuilding or overhaul;

(viii) capital and operating support including computer hardware or software, with prior department approval;

(ix) transit-related intelligent transportation systems;

(x) the introduction of new technology, through innovative and improved products, into public transportation;

(xi) passenger shelters, bus stop signs, and similar passenger amenities, with prior department approval;

(xii) mobility management;

(xiii) the lease of vehicles or equipment, provided that the subrecipient, with the concurrence of the department, determines that a lease is more cost effective than purchase after considering management efficiency, availability of equipment, staffing capabilities, and guidelines on capital leases as contained in 49 CFR Part 639;

(xiv) the capital portions of costs for service under contract; and

(xv) the provision of Americans with Disabilities Act of 1990 (ADA) paratransit service directly related to fixed route JARC services, which shall be used only by subrecipients that are in compliance with ADA requirements for both fixed route and demand responsive service.

(B) Reimbursement rates.

(i) federal funds may be used to reimburse up to 80% of eligible capital expenditures;

(ii) the federal share may increase to up to 90% for incremental costs related to compliance with the Clean Air Act or with the ADA; and

(iii) eligibility standards for the higher federal share are defined in FTA Circular 9050.1, or its latest version.

(3) Project administration. Administrative costs associated with a JARC project are eligible for a federal reimbursement rate of 50%.

(4) Planning activities. The federal reimbursement rate is 80%. Planning activities may include:

(A) studies relating to management, operations, and capital requirements;

(B) evaluation of previously funded projects; and

(C) other similar or related activities prior to and in preparation for the undertaking or improvement of JARC-eligible services.

(5) Marketing projects. The federal reimbursement rate is 80%. Marketing activities may include:

(A) market research;

(B) production of route maps and schedules;

(C) information delivery;

(D) website development;

(E) advertising;

(F) promotion of the use of transit vouchers by welfare recipients and eligible low income individuals; and

(G) promotion of employer-provided transportation, including the Internal Revenue Service's transit pass benefit.

(6) Operating expenses. Operating expenses are reimbursed at 50% of net operating expenses. Operating expenses are those costs directly tied to systems operations. FTA Circular 9030.1C or its latest published version shall be the guide for determining eligible operating expenses. Examples are:

(A) fuel;

(B) oil;

(C) driver, dispatcher, and mechanic salaries;

(D) purchase of service; and

(E) purchase of vouchers.

(g) Ineligible expenses include:

(1) construction, except for passenger shelters, signage, and similar passenger amenities specifically approved by the department;

(2) extended vehicle warranties;

(3) purchase and/or maintenance of vehicles intended for private use;

(4) purchase of transit passes for use on fixed route or ADA complementary paratransit services; and

(5) other FTA-prohibited expenses.

(h) Local share requirements.

(1) Eligible match sources include local, state, or federal programs, including funds disbursed from the Texas Workforce Commission, local workforce development boards, human service agencies, and the Medicaid Medical Transportation Program. Unrestricted federal funds are also eligible as match, such as Temporary Assistance for Needy Families (42 USC 603(a)(5)(C)(vii)). With prior department approval, in-kind contributions, volunteer services, and donations directly attributable to the project are eligible as local share if the value is documented.

(2) Other U.S. Department of Transportation program funds cannot be used as the local share required for Section 5316 grants. Fares cannot be used as match for any expense but must, instead, be used to determine the net operating expense to reduce the amount of requested reimbursement.

(i) Planning requirement.

(1) Projects submitted in response to the department's call for projects must be derived from a locally developed, coordinated public transit-human service transportation plan. The plan must be developed through a process that includes representatives of public, private,

and nonprofit transportation and human service providers and participation by the public.

(2) The commission supports the development of regional service plans that respond to the department's charge in Transportation Code, §461.004 to identify:

(A) overlaps and gaps in the provision of public transportation services, including services that could be more effectively provided by existing, privately funded transportation resources;

(B) underused equipment owned by public transportation providers; and

(C) inefficiencies in the provision of public transportation services by any public transportation provider.

(3) The commission anticipates that the regional service planning process will be used to meet the requirements of the local coordinated planning process described in paragraph (1) of this subsection. Regions interested in participating in the JARC program shall develop and prioritize Section 5316 projects in response to the employment transportation deficiencies identified in the regional planning process and documented in the plan.

(4) A JARC project must:

(A) contain goals and objectives;

(B) discuss rider origination location and employment and employment-related destinations and how the project fills the transportation gap;

(C) describe how it implements the regional service plan;

(D) describe the role of the local workforce development board or its service provider in developing the project;

(E) explain how the project will maximize use of existing transportation service providers;

(F) provide a cost estimate; and

(G) identify match sources including employer-provided or employer-assisted transportation service strategies incorporated in the project.

(j) Allocation of funds. As part of its administration of the Section 5316 program, the department is charged with ensuring that there is a fair and equitable distribution of program funds within the state (49 USC §5316(f)(2)).

(1) The department will act as the designated recipient for projects in urbanized areas of less than 200,000 population and in nonurbanized areas. Of the amount apportioned to these areas by FTA's annual publication in the *Federal Register,* the department may use up to 10% of the total for its administrative, planning, and technical assistance activities to support the JARC program statewide.

(2) The department will allocate the remaining Section 5316 funds to subrecipients through a statewide competitive selection process.

(3) Unless the governor certifies that all program objectives are being met, funds apportioned to urbanized or to nonurbanized areas will be available only to fund projects in urbanized or nonurbanized areas, respectively.

(4) The origination location of the riders, not their destination, shall be the basis for determining which apportionment the department uses to fund an approved project.

(5) At a minimum, the department will publish a notice in the *Texas Register* soliciting proposals for the award of Section 5316 JARC grants. An eligible entity may submit a proposal for an eligible project in response to the published notice.

(A) The proposal must include a detailed description of:

(i) the project and the need for the project;

(ii) how the award of transportation JARC funds will expand the availability of employment related transportation services;

(iii) how the project will:

(I) promote the development of employment transportation services;

(II) support local economic development and expand economic opportunity for economically disadvantaged individuals;

(III) fully integrate the JARC program with other federal and state programs supporting public, employment, and human service transportation; and

(IV) improve the efficiency and effectiveness of employment related transportation opportunities.

(B) The proposal must describe the project's relationship to the locally developed, coordinated public transit-human service transportation plan.

(C) The department may require supplemental information to clarify the issues described in subparagraphs (A) and (B) of this paragraph.

(k) Grant award.

(1) After commission and FTA approval of the program of projects, the department will enter into grant agreements with individual subrecipients. A subrecipient must comply with all rules and regulations applicable to the Section 5316 program.

(2) The commission will make the final selection of projects and will select projects based on the potential of the project to:

(A) reduce congestion;

(B) expand economic opportunity;

(C) enhance safety;

(D) improve air quality; and

(E) increase the value of transportation assets.

(3) Failure to expend funds in a timely manner may cause the department to terminate the grant and re-award the unobligated balance to another project.

(l) Vehicle leasing. Vehicles acquired under the Section 5316 program may be leased to other entities, with prior department approval, such as local public bodies or agencies, private non-profit agencies, or private for-profit operators. The lessee shall operate the vehicles on behalf of the Section 5316 subrecipient and provide the transportation services as described in the grant application. The Section 5316 subrecipient is responsible for seeing that all federal and state rules and regulations are observed by the lessee.

(m) Incidental vehicle use. A vehicle that is purchased with Section 5316 funds may be used for incidental uses that do not conflict with the primary use of the vehicle to provide transportation services for employment and employment-related transportation. Examples of permissible incidental uses are stopping for retail purchases enroute

home from the workday, allowing riders not engaged in employment activities to occupy vacant seats, delivering meals, or using the vehicle for other public transportation activities when it is not required for JARC project purposes. The vehicle shall not be altered in any way to accommodate incidental use.

(n) Disposition of vehicles at end of the grant. If a subrecipient is no longer receiving funds for a JARC project and has purchased a vehicle with JARC funds, the vehicle may be transferred to another subrecipient, in accordance with state laws and procedures governing disposition requirements.

§31.18. Section 5317 Grant Program.

(a) Purpose. Section 5317, Federal Transit Act, (49 USC §5317), authorizes the Secretary of the U.S. DOT to make grants for public transportation projects that provide new public transportation services and public transportation alternatives beyond those currently required by the Americans with Disabilities Act of 1990 (ADA) that assist individuals with disabilities with transportation, including transportation to and from jobs and employment support services. The commission has been designated by the governor to administer the Section 5317 program, known as the New Freedom Program, or NF, in areas less than 200,000 population.

(b) Goal and objectives. The department's goal in administering the Section 5317 program is to provide new or improved public transportation services and alternatives, beyond the requirements of the ADA, to assist individuals with disabilities. To achieve this goal, the department's objectives are to:

(1) promote the development and maintenance of a network of transportation services and alternatives, beyond the requirements of the ADA, for persons with disabilities throughout the state, in partnership with local officials, public and private non-profit agencies, and operators of public transportation services;

(2) fully integrate the Section 5317 program with other federal, state, and local resources and programs that are designed to serve similar populations;

(3) foster the development of local, coordinated public and human service transportation service plans from which NF projects are derived;

(4) improve the efficiency, effectiveness, and safety of Section 5317 project providers through the provision of technical assistance; and

(5) include private sector operators in the overall plan to provide NF program transportation services for persons with disabilities.

(c) Department role. The department acts as the designated recipient for Section 5317 funds apportioned to the state for all urbanized areas less than 200,000 population and all nonurbanized areas. The subrecipient shall retain control of daily operations.

(d) Project types.

(1) New public transportation service projects, "beyond ADA", include:

(A) providing paratransit services beyond minimum requirements (3/4 mile to either side of a fixed route) for a transit provider operating fixed route service;

(B) making accessibility improvements to existing transit and intermodal stations not designated as key stations; for example, adding an elevator or ramps, detectable warnings, improving signage;

(C) building an accessible path to a bus stop that is currently inaccessible, including curbcuts, sidewalks, pedestrian signals or other accessible features;

(D) implementing technology improvements that enhance accessibility for persons with disabilities;

(E) implementing "same day" paratransit services; and

(F) otherwise facilitating or providing transportation services beyond ADA requirements, including transportation to and from employment and employment-related destinations.

(2) New public transportation alternatives, "beyond ADA", include:

(A) purchasing vehicles and supporting accessible taxi, ride-sharing, and vanpooling programs;

(B) supporting voucher programs for transportation services offered by human service providers;

(C) supporting volunteer driver and aide programs;

(D) acquiring transportation services by a contract, lease, or other arrangement;

(E) supporting mobility management and coordination programs among public transportation providers and other human service agencies providing transportation;

(F) new feeder service (transit service that provides access) to commuter rail, commuter bus, intercity rail and intercity bus stations, for which complementary paratransit service is not required under the ADA;

(G) new training programs for individual users on awareness, knowledge, and skills of public and alternative transportation options available in their communities. This includes travel instruction and travel training services; and

(H) otherwise facilitating or providing new transportation services for persons with disabilities, including transportation to and from employment and employment-related destinations.

(e) Eligible subrecipients.

(1) State agencies, local governmental authorities, private nonprofit organizations, private for-profit operators, and operators of public transportation services are eligible to receive Section 5317 funds through the department.

(2) Applicants who are subrecipients of public transportation funds through another program administered by the department must be in good standing with the department as defined in §31.3 of this chapter.

(f) Eligible assistance categories include:

(1) State administrative expenses. The department may use up to 10% of the annual federal apportionment for urbanized areas less than 200,000 population and nonurbanized areas to defray its expenses incurred for the planning and administration of the Section 5317 program. State administrative and technical assistance expenses do not require a non-federal match.

(2) Capital expenses.

(A) Eligible items include:

(i) buses, vans, or other paratransit vehicles, fareboxes, wheelchair lifts and restraints;

(ii) radios and communications equipment;

(iii) accessibility aids;

(iv) equipment installation costs;

(v) vehicle procurement, testing, inspection, and acceptance costs;

(vi) vehicle rebuilding or overhaul;

(vii) capital and operational support including computer hardware or software, with prior department approval;

(viii) preventive maintenance, including all maintenance costs, with prior department approval;

(ix) transit-related intelligent transportation systems;

(x) the introduction of new technology, through innovative and improved products, into public transportation;

(xi) curbcuts, sidewalks, pedestrian signals or other accessible features;

(xii) mobility management;

(xiii) the lease of vehicles or equipment, provided that the subrecipient, with the concurrence of the department, determines that a lease is more cost effective than the purchase after considering management efficiency, availability of equipment, staffing capabilities, and guidelines on capital leases as contained in 49 CFR Part 639; and

(xiv) the capital portions of costs for service under contract.

(B) Reimbursement rates.

(i) Federal funds may be used to reimburse up to 80% of eligible capital expenditures; and

(ii) the federal share may increase up to 90% for incremental costs related to compliance with the Clean Air Act or with the ADA. Eligibility standards for the higher federal share are defined in FTA Circular 9045.1, or its latest version.

(3) Project administration. Administrative costs associated with a NF project are eligible for a federal reimbursement rate of 50%.

(4) Operating expenses. Operating expenses are reimbursed at 50% of net operating expenses. Operating expenses are those costs directly tied to systems operations. FTA Circular 9030.1C, or its latest published version, shall be the guide for determining eligible operating expenses not specifically listed in this paragraph. Examples are:

(A) fuel and oil;

(B) maintenance, with prior department approval;

(C) driver, dispatcher, and mechanic salaries;

(D) purchase of service;

(E) reimbursement of costs associated with a volunteer driver program; and

(F) purchase of vouchers.

(g) Ineligible expenses include:

(1) extended vehicle warranties;

(2) purchase and/or maintenance of vehicles intended for private use;

(3) marketing;

(4) planning;

(5) purchase of transit passes for use on fixed route or ADA complementary paratransit services; and

(6) other FTA-prohibited expenses.

(h) Local share requirements.

(1) Eligible match sources include local, state, or federal program funds disbursed from the Texas Workforce Commission, local workforce development boards, human service agencies and the Medicaid Medical Transportation Program. Unrestricted federal funds are also eligible as match, such as Temporary Assistance for Needy Families (42 USC 603(a)(5)(C)(vii)). With prior department approval, in-kind contributions, volunteer services, and donations directly attributable to the project are eligible as local share if the value is documented.

(2) Other U.S. Department of Transportation program funds cannot be used as the local share required for Section 5317 grants. Fares cannot be used as match for any expense but must, instead, be used to determine the net operating expense to reduce the amount of requested reimbursement.

(i) Planning requirement.

(1) Projects submitted in response to the department's call for projects must be derived from a locally developed, coordinated public transit-human service transportation plan. The plan must be developed through a process that includes representatives of public, private, and nonprofit transportation and human service providers and participation by the public.

(2) The commission supports the development of regional service plans that respond to the department's charge in Transportation Code, §461.004 to identify:

(A) overlaps and gaps in the provision of public transportation services including services that could be more effectively provided by existing, privately funded transportation resources;

(B) underused equipment owned by public transportation providers; and

(C) inefficiencies in the provision of public transportation services by any public transportation provider.

(3) The commission anticipates that the regional service planning process will be used to meet the requirements of the local coordinated planning process defined in paragraph (1) of this subsection. Regions interested in participating in the NF program shall develop and prioritize Section 5317 projects in response to the opportunities to improve transportation for persons with disabilities uncovered in the regional planning process and documented in the plan.

(4) An NF project must:

(A) contain goals and objectives;

(B) discuss rider origination location and destinations and how the project fills the transportation gap by providing new transportation services or new transportation alternatives beyond ADA requirements;

(C) describe how it implements the regional service plan;

(D) explain how the project will maximize use of existing transportation service providers;

(E) provide a cost estimate; and

(F) identify match sources.

(G) Where transportation to employment or employment-related destinations is part of the project, any employer-provided or employer-assisted transportation service strategies incorporated in the project must also be identified.

(j) Allocation of funds. As part of its administration of the Section 5317 program, the department is charged with ensuring that there is a fair and equitable distribution of program funds within the state (49 USC §5317(e)(2)).

(1) The department will act as the designated recipient for projects in urbanized areas of less than 200,000 population and in nonurbanized areas. Of the amount apportioned to these areas by FTA's annual publication in the *Federal Register,* the department may use up to 10% of the total for its administrative, planning, and technical assistance activities to support the NF program statewide.

(2) The department will allocate the remaining Section 5317 funds to subrecipients through a competitive selection process.

(3) Funds apportioned to urbanized areas less than 200,000 population will be available only to fund projects in these geographic areas.

(4) Funds apportioned to nonurbanized areas will be available only for projects serving nonurbanized areas.

(5) The origin of the riders, not their destination, shall be the basis for determining which apportionment the department uses to fund an approved project.

(6) At a minimum, the department will publish a notice in the *Texas Register* soliciting proposals for the award for Section 5317 NF grants.

(A) An eligible entity may submit a proposal for an eligible project in response to the published notice. The proposal must include a detailed description of:

(i) the project and the need for the project;

(ii) the methods by which the award of transportation NF funds will provide new transportation services or new alternatives, beyond ADA requirements, for persons with disabilities;

(iii) how the project will:

(I) promote the development and maintenance of a network of transportation services for persons with disabilities;

(II) expand economic opportunity for individuals with disabilities;

(III) fully integrate the NF program with other federal, state, and local resources and programs that are designed to serve similar populations; and

(IV) improve the efficiency, effectiveness, and safety of transportation services for persons with disabilities.

(B) The proposal must describe the project's relationship to the locally developed, coordinated public transit-human service transportation plan.

(C) The department may require supplemental information to clarify the issues described in paragraph (6)(A) and (B) of this subsection.

(k) Grant Award.

(1) After commission and FTA approval of the program of projects, the department will enter into grant agreements with individual subrecipients. A subrecipient must comply with all requirements, rules, and regulations applicable to the Section 5317 program.

(2) The commission will make the final selection of projects and will select projects based on the potential of the project to:

(A) reduce congestion;

(B) expand economic opportunity;

(C) enhance safety;

(D) improve air quality; and

(E) increase the value of transportation assets.

(3) Failure to expend funds in a timely manner may cause the department to terminate the grant and re-award the unobligated balance to another project.

(l) Vehicle leasing. Vehicles acquired under the Section 5317 program may be leased to other entities, with prior department approval, such as local public bodies or agencies, private non-profit agencies, or private for-profit operators. The lessee shall operate the vehicles on behalf of the Section 5317 recipient and provide the transportation services as described in the grant application. The Section 5317 recipient is responsible for seeing that all federal and state rules and regulations are observed by the lessee.

(m) Incidental vehicle use. A vehicle that is purchased with Section 5317 funds may be used for incidental uses that do not conflict with the primary use of the vehicle to provide new or alternative transportation services beyond ADA requirements. Examples of permissible incidental uses are meal delivery, allowing able-bodied persons to occupy vacant seats or using the vehicle for other public transportation activities not required for its NF project purposes. The vehicle shall not be altered in any way to accommodate incidental use.

(n) Disposition of vehicles at end of the grant. If a subrecipient is no longer receiving funds for an NF project and has purchased a vehicle with NF funds, the vehicle may be transferred to another subrecipient, in accordance with state laws and procedures governing disposition requirements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800569
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Effective date: February 21, 2008
Proposal publication date: November 30, 2007
For further information, please call: (512) 463-8683

SUBCHAPTER D. PROGRAM ADMINISTRATION

43 TAC §§31.40 - 31.44, 31.47, 31.48

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 455, 456, 458, 460, and 461.

§31.42. Standard Federal Requirements.

(a) Purpose. This section describes the standard federal requirements that apply to entities that receive, either directly or as pass-through, FTA grant funds under the following programs codified at 49 U.S.C.:

(1) Section 5303 Grants to MPOs;

(2) Section 5307 Urbanized Area Formula Grants;

(3) Section 5309 Capital Investment Grants;

(4) Section 5310 Formula Grants for Special Needs of Elderly Individuals and Individuals with Disabilities;

(5) Section 5311 Formula Grants for Other Than Urbanized Areas;

(6) Section 5304 State Planning and Research Programs;

(7) Section 5316 Job Access and Reverse Commute Formula Grants; and

(8) Section 5317 New Freedom Program.

(b) Requirements. All entities that receive funds under the Federal Transit Act, codified at 49 U.S.C. §5301 et seq., shall comply with the provisions of the following statutes and regulations:

(1) Federal Transit Laws, Title 49, United States Code, Chapter 53;

(2) Safe, Accountable, Flexible, Efficient, Transportation Equity Act: A Legacy for Users, (SAFETEA-LU) (Pub. L. 109-59, 119 Stat. 1144, August 10, 2005);

(3) Federal-aid highway and surface transportation laws, Title 23, United States Code;

(4) Transportation Equity Act for the 21st Century (TEA-21) (Pub. L. 105-178, 112 Stat. 107, June 9, 1998);

(5) Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) (Pub. L. 102-240, 105 Stat. 1914, Dec. 18, 1991);

(6) Americans with Disabilities Act of 1990, as amended, 42 U.S.C. 12101 et seq.;

(7) Government Performance Results Act of 1993, as amended (Pub. L. 103-62, 107 Stat. 285, August 3 1993);

(8) Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794;

(9) Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d;

(10) Title VII of the Civil Rights Act of 1964, as amended, 43 U.S.C. 2000e;

(11) Clean Air Act, as amended, 42 U.S.C. 7401 et seq;

(12) Section 404 of the Clean Water Act, as amended, 33 U.S.C. 1344;

(13) Policy on Lands, Wildlife, and Waterfowl Refuges, and Historic Sites, 49 U.S.C. 303;

(14) National Historic Preservation Act, 16 U.S.C. 470f;

(15) Internal Revenue Code, Non-profit Organizations, 26 U.S.C. 501;

(16) Lobbying Restrictions, 31 U.S.C. 1352;

(17) State Infrastructure Provisions of National Highway System Designation Act of 1995, as amended, 23 U.S.C. 101 note;

(18) Congressional Declaration of Policy Respecting Insular Areas, 48 U.S.C. §1469a;

(19) Program Fraud Civil Remedies Act, 31 U.S.C. 3801 et seq.;

(20) Sections 210 and 305 of the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970, as amended, 42 U.S.C. 4601, et seq.;

(21) Sections 4001 and 1555 of the Federal Acquisition Streamlining Act of 1994, 41 U.S.C. §403(11) and 40 U.S.C. §481(b), respectively;

(22) Executive Order 12612, "Federalism," dated 10-26-87;

(23) Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101 et seq.;

(24) Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. 1681 et seq.;

(25) National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321 et seq.;

(26) Federal Funding Accountability and Transparency Act of 2006 (Pub. L 109-282, 120 Stat 1186, Sept. 26, 2006);

(27) Davis-Bacon Act, as amended, 40 U.S.C. 3141 et seq.;

(28) Drug-Free Workplace Act of 1988, as amended, 41 U.S.C. 701 et seq.;

(29) Alaska Native Claims Settlement Act, as amended, 43 U.S.C. 1601 et seq.;

(30) U.S. Department of Housing and Urban Development regulations, "Community Development Block Grants," 24 C.F.R. Part 570;

(31) Joint Federal Highway Administration/FTA regulations, "Planning Assistance and Standards," 23 C.F.R. Part 450 and 49 C.F.R. Part 613;

(32) Joint Federal Highway Administration/FTA regulations, "Environmental Impact and Related Procedures," 23 C.F.R. Part 771 and 49 C.F.R. Part 622;

(33) Federal Motor Carrier Safety Administration regulations, "Controlled Substances and Alcohol Use and Testing," 49 C.F.R. Part 382;

(34) Federal Highway Administration regulations, "Classes of Actions," 23 C.F.R. §771.115;

(35) Federal Highway Administration regulations, "Categorical Exclusions," 23 C.F.R. §771.117;

(36) Judicial Administration regulations, "Nondiscrimination; Equal Employment Opportunity; Policies and Procedures," 28 C.F.R. Part 42;

(37) U.S. Department of Treasury regulations, "Rules and Procedures for Efficient Federal-State Funds Transfers," 31 C.F.R. Part 205;

(38) U.S. Environmental Protection Agency regulations, "Determining Conformity of Federal Actions to State or Federal Implementation Plans," 40 C.F.R. Part 93;

(39) U.S. DOT regulations, "Organization and Delegation of Powers and Duties," 49 C.F.R. Part 1;

(40) U.S. DOT regulations, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments," 49 C.F.R. Part 18;

(41) U.S. DOT regulations, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," 49 C.F.R. Part 19;

(42) U.S. DOT regulations, "New Restrictions on Lobbying," 49 C.F.R. Part 20;

(43) U.S. DOT regulations, "Nondiscrimination in Federally-Assisted Programs of the Department of Transportation-Effectuation of Title VI of the Civil Rights Act of 1964," 49 C.F.R. Part 21;

(44) U.S. DOT regulations, "Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally-Assisted Programs," 49 C.F.R. Part 24;

(45) U.S. DOT regulations "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 49 C.F.R. Part 25;

(46) U.S. DOT regulations, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs," 49 C.F.R. Part 26;

(47) U.S. DOT regulations, "Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance," 49 C.F.R. Part 27;

(48) U.S. DOT regulations, "Governmentwide Debarment and Suspension (Nonprocurement)," 49 C.F.R. Part 29, as amended by 71 FR 62396, Oct. 25 2006;

(49) U.S. DOT regulations, "Governmentwide Requirements for Drug-Free Workplace (Financial Assistance)," 49 C.F.R. Part 32;

(50) U.S. DOT regulations, "Transportation Services for Individuals with Disabilities (ADA)," 49 C.F.R. Part 37;

(51) U.S. DOT regulations, "Americans with Disabilities Act (ADA) Accessibility Specifications for Transportation Vehicles," 49 C.F.R. Part 38;

(52) U.S. DOT regulations, "Procedures for Transportation Workplace Drug and Alcohol Testing Programs," 49 C.F.R. Part 40;

(53) DOT Seismic Safety Rule, 49 C.F.R. §41.117;

(54) FTA regulations, 49 C.F.R. Chapter VI;

(55) FTA regulations, "Charter Service," 49 C.F.R. Part 604;

(56) FTA Disposition of Inquiries, "Pre-Award and Post-Delivery Audits of Rolling Stock Questions and Answers," 57 FR 10834 (1992);

(57) Uniform Standards of Professional Appraisal Practice (USPAP);

(58) Executive Order 12372, "Intergovernmental Review of Federal Programs," July 14, 1982;

(59) Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (February 11, 1994);

(60) Executive Order 13217, "Community-Based Alternatives for Individuals with Disabilities," June 18, 2001;

(61) Executive Order 13330, "Human Service Transportation Coordination" (February 24, 2004);

(62) Department of Labor Guidelines, "DOL Guidelines, Section 5333(b), Federal Transit law," 29 C.F.R. Part 215;

(63) Office of Management and Budget Circular A-87, "Cost Principles for State, Local, and Indian Tribal Governments";

(64) Office of Management and Budget Circular A-94, "Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs";

(65) Office of Management and Budget Circular A-122, "Cost Principles for Non-Profit Organizations," codified at 2 C.F.R. Part 230;

(66) Office of Management and Budget Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations";

(67) U.S. Department of Transportation (DOT) Order to Address Environmental Justice in Minority Populations and Low-Income Populations, 62 FR 18377 (April 15, 1997);

(68) U.S. DOT Policy Guidance Concerning Recipients' Responsibilities to Limited English Proficient (LEP) Persons, 70 FR 74087 (December 14, 2005);

(69) FTA Circular 4220.1E, or its latest version, "Third Party Contracting Requirements";

(70) FTA Circular 5010.1C, or its latest version, "Grant Management Guidelines";

(71) FTA Circular 9030.1C, or its latest version, "Urbanized Formula Program Guidance and Application Instructions";

(72) FTA Circular 9040.1F, or its latest version, "Nonurbanized Area Formula Program Guidance and Application Instructions";

(73) FTA Circular 4702.1, or its latest version, Title VI Program Guidelines for FTA Recipients";

(74) Notice of Final Agency Guidance on the Eligibility of Joint Development Improvements Under Federal Transit Law, 72 FR 5788 (February 7, 2007);

(75) U.S. General Services Administration, "Lists of Parties Excluded from Federal Procurement and Nonprocurement Programs";

(76) FTA Master Agreement FTA MA (13); and

(77) "Guidelines for Disbursements," FTA ECHO-Web System Operations Manual.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800570

Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Effective date: February 21, 2008
Proposal publication date: November 30, 2007
For further information, please call: (512) 463-8683

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SUBCHAPTER E. PROPERTY MANAGEMENT STANDARDS

43 TAC §31.53, §31.57

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 455, 456, 458, 460, and 461.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 1, 2008.

TRD-200800571
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Effective date: February 21, 2008
Proposal publication date: November 30, 2007
For further information, please call: (512) 463-8683

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Agency Rule Review Plan

Texas Board of Professional Engineers

Title 22, Part 6

TRD-200800673
Filed: February 4, 2008

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Proposed Rule Review

Texas Board of Professional Engineers

Title 22, Part 6

The Texas Board of Professional Engineers will review and consider for readoption, revision, or repeal Title 22 Texas Administrative Code, Part 6, Chapter 131, concerning Organization and Administration.

This review is conducted pursuant to §2001.039 of the Government Code.

In conducting its review the Board will determine whether the reasons for the rule continue to exist. The rule review will also determine whether the rule is obsolete, reflects current legal and policy considerations, and reflects current procedures of the Board.

Any comments pertaining to this notice of intention may be submitted within the next 30 days to Lance Kinney, P.E., Deputy Executive Director, Texas Board of Professional Engineers, 1917 IH-35 South, Austin, Texas 78741 or faxed to his attention at (512) 440-0417. Any proposed changes to the rules as a result of this review will be published in the Proposed Rule Section of the *Texas Register* and will be open for an additional comment period prior to final adoption or repeal by the Board.

TRD-200800674
Dale Beebe Farrow, P.E.
Executive Director
Texas Board of Professional Engineers
Filed: February 4, 2008

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Adopted Rule Reviews

Texas Education Agency

Title 19, Part 2

The State Board of Education (SBOE) adopts the review of 19 TAC Chapter 157, Hearings and Appeals, Subchapter A, General Provisions for Hearings Before the State Board of Education, and Subchapter D, Independent Hearing Examiners, pursuant to the Texas Government Code, §2001.039. The SBOE proposed the review of 19 TAC Chapter 157, Subchapters A and D, in the October 5, 2007, issue of the *Texas Register* (32 TexReg 7085).

The SBOE finds that the reasons for adopting 19 TAC Chapter 157, Subchapters A and D, continue to exist. The SBOE received no comments related to the rule review requirement.

The SBOE is proposing an amendment in 19 TAC Chapter 157, Subchapter D, that would require that independent hearing examiners submit fingerprints for the purpose of obtaining criminal history reports and that would update the continuing education requirements. The proposed amendment to 19 TAC §157.41, Certification Criteria for Independent Hearing Examiners, may be found in the Proposed Rules section of this *Texas Register* issue.

TRD-200800653
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: February 1, 2008

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Texas Higher Education Coordinating Board

Title 19, Part 1

The Texas Higher Education Coordinating Board adopts the review of Chapter 1 concerning Agency Administration. The proposed notice of review was published in the August 24, 2007, issue of the *Texas Register* (32 TexReg 5393). During its review, the Board determined that the initial reasons for adopting these sections continue to exist. The rules are therefore readopted in accordance with the requirements of the Government Code, §2001.039.

This concludes the Board's review of Chapter 1 as required by the Texas Government Code, §2001.039.

TRD-200800708
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: February 5, 2008

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The Texas Higher Education Coordinating Board adopts the review of Chapter 4 concerning Rules Applying to all Public Institutions of Higher Education in Texas. The proposed notice of review was published in the August 24, 2007, issue of the *Texas Register* (32 TexReg 5393). During its review, the Board determined that the initial reasons for adopting these sections continue to exist. The rules are there-

fore readopted in accordance with the requirements of the Government Code, §2001.039.

This concludes the Board's review of Chapter 4 as required by the Texas Government Code, §2001.039.

TRD-200800709
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: February 5, 2008

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The Texas Higher Education Coordinating Board (Board) adopts the review of Chapter 5, concerning Rules Applying to Public Universities and/or Health-Related Institutions of Higher Education in Texas. The proposed notice of review was published in the August 24, 2007, issue of the *Texas Register* (32 TexReg 5393). During its review, the Board determined that the initial reasons for adopting these sections continue to exist. The rules are, therefore, readopted in accordance with the requirements of the Government Code, §2001.039.

This concludes the Board's review of Chapter 5 as required by the Texas Government Code, §2001.039.

TRD-200800710
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: February 5, 2008

♦ ♦ ♦

The Texas Higher Education Coordinating Board (Board) adopts the review of Chapter 6, concerning Health Education, Training, and Research Funds. The proposed notice of review was published in the August 24, 2007, issue of the *Texas Register* (32 TexReg 5393). During its review, the Board determined that the initial reasons for adopting these sections continue to exist. The rules are, therefore, readopted in accordance with the requirements of the Government Code, §2001.039.

This concludes the Board's review of Chapter 6 as required by the Texas Government Code, §2001.039.

TRD-200800711
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: February 5, 2008

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The Texas Higher Education Coordinating Board adopts the review of Chapter 13 concerning Financial Planning. The proposed notice of review was published in the August 24, 2007, issue of the *Texas Register* (32 TexReg 5393). During its review, the Board determined that the initial reasons for adopting these sections continue to exist. The rules are therefore readopted in accordance with the requirements of the Government Code, §2001.039.

This concludes the Board's review of Chapter 13 as required by the Texas Government Code, §2001.039.

TRD-200800712
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: February 5, 2008

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The Texas Higher Education Coordinating Board adopts the review of Chapter 14 concerning Research Funding Programs. The proposed notice of review was published in the August 24, 2007, issue of the *Texas Register* (32 TexReg 5394). During its review, the Board determined that the initial reasons for adopting these sections continue to exist. The rules are therefore readopted in accordance with the requirements of the Government Code, §2001.039.

This concludes the Board's review of Chapter 14 as required by the Texas Government Code, §2001.039.

TRD-200800713
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: February 5, 2008

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Texas Youth Commission

Title 37, Part 3

Pursuant to Government Code §2001.039, the Texas Youth Commission files this notice of re-adoption for 37 TAC Chapter 97 (Security and Control) and Chapter 99 (General Provisions). The proposed review was published in the December 21, 2007, issue of the *Texas Register* (32 TexReg 9736). No public comments were received regarding this review.

The Commission has determined that the reasons for adopting the rules contained in these chapters continue to exist. Any amendments identified by the Commission during its internal review of these chapters will be proposed in the *Texas Register* in accordance with the Administrative Procedures Act.

This concludes the agency's review of Chapters 97 and 99.

TRD-200800548
Steve Foster
General Counsel
Texas Youth Commission
Filed: January 31, 2008

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Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 16 TAC §31.4(b)(4)

HEALTH RISK WARNING SIGN

- **Drinking any type of alcohol while pregnant can hurt your baby's brain, heart, kidneys, and other organs and can cause birth defects.**
- **The safest choice is not to drink at all when you are pregnant or trying to become pregnant.**
- **If you might be pregnant, think before you drink.**

AVISO SOBRE RIESGOS DE SALUD

- Beber cualquier tipo de alcohol cuando está embarazada puede hacerles daño al cerebro, al corazón, a los riñones y a otros órganos de su bebé y puede causar defectos de nacimiento.

- Lo más seguro es no beber nada de alcohol cuando está intentando quedar embarazada o ya lo está.

- Si es posible que esté embarazada, piénselo antes de beber.

Figure: 40 TAC §711.401(a)

The investigator notifies...	Within...	Does the investigator reveal the identity of the reporter?
The administrator or CEO	One hour of receipt of the allegation by DFPS.	Only if the alleged perpetrator is a Mental Health Services Provider and the allegation is sexual exploitation.
DADS Office of Consumer Rights and Services, by fax, at (512) 438-4302 of allegations involving an HCSW provider.	24 hours of receipt of the allegation by DFPS or the next working day.	
Law enforcement of any allegation involving a child.	One hour of receipt of the allegation by DFPS.	Yes
Law Enforcement of allegations involving serious physical injury, sexual abuse, or death of an adult person served.		

Figure: 40 TAC §711.401(b)

The Investigator notifies...	Within...	Does the investigator reveal the identity of the reporter?
For State Hospitals - The DSHS Office of Consumer Services and Rights Protection at (800) 252-8154.	One hour of receipt of the allegation by DFPS.	Only if the alleged perpetrator is a Mental Health Services Provider and the allegation is sexual exploitation.
For State Schools and State Centers - The DADS Office of Consumer Rights and Services at (800) 458-9858.		
For HCSW Programs - The HCSW CEO/Administrator Designee.		
For Community Centers and Local Authorities - The DADS Office of Consumer Rights and Services at (800) 458-9858, DSHS Office of Consumer Services and Rights Protection at (800) 252-8154, and either the Chair of the Community Center Board of Trustees or Local Authority Board of Directors, as appropriate.	24 hours of receipt of the allegation by DFPS or the next working day.	

Figure: 40 TAC §745.119

Educational Facility	Criteria for Exemption
(1) Accredited Educational Facility for Grades Pre-Kindergarten and Above	(A) The educational facility operates primarily for educational purposes; (B) The educational facility operates the program; (C) All children in the program are at least pre-kindergarten age; and (D) The Texas Education Agency (TEA) or the Southern Association of Colleges and Southern Association of Colleges and Schools (SACS) accredits the educational facility; or the Texas Private School Accreditation Commission (TEPSAC) accredits the educational facility, and the educational facility operates in a county that has a population of less than 25,000. Note: For educational facilities that also provide residential child care, See §745.125 of this title (relating to Are additional exemption criteria required for an educational facility that provides residential child care?).
(2) Before and/or After-School Child Day-Care Operated by an Accredited Educational Facility	(A) TEA or SACS accredits the educational facility; or TEPSAC accredits the educational facility, and the educational facility operates in a county that has a population of less than 25,000; (B) The educational facility operates the child day-care program; and (C) All children in the program are at least pre-kindergarten age.
(3) Before and/or After-School Child Day-Care Operated by a Contracted Entity	(A) TEA or SACS accredits the educational facility; or TEPSAC accredits the educational facility, and the educational facility operates in a county that has a population of less than 25,000; (B) The accredited educational facility contracts with an entity to operate the before and/or after-school child day care; (C) All children in the program are at least pre-kindergarten age; and (D) TEA, SACS, or TEPSAC approves the curriculum content of the before and after-school child day care.
(4) Educational Facility that is a Member of an Organization Requiring Compliance with Standards	(A) The educational facility must provide an educational program from grades pre-kindergarten through at least grade two; (B) All children in the program are at least pre-kindergarten age; (C) The educational facility provides child day care no more than one hour before and one hour after the customary school day in the community; and (D) The educational facility is a member of an organization that either: (i) publishes health, safety, fire, and sanitation standards equal to those required by the state, county, or municipality; or (ii) follows the state, county, or municipal health, safety, and fire codes.

(5) Private Educational Facility, Including an Educational Facility that is Religious in Nature	(A) The educational facility offers an educational program; (B) If the educational facility is located in a county that has a population of less than 25,000, all children in the program are at least four-years old; or if the educational facility is located in a county that has a population of 25,000 or more, all children in the program are at least kindergarten age; (C) No more than two hours total of child day care is provided before or after the customary school day in the community; and (D) It operates one or more of the following: (i) Preschool or kindergarten through at least grade three; (ii) Grades 9 through 12; or (iii) The same pattern of public school grade clustering as the local school district elementary grades (1 through 6).

Figure: 40 TAC §745.509

Type and Amount of Fee	When Fee is Due	Consequences for Failure to Pay Fee on Time
(1) Application processing fee: $35	Before we accept your application	We will return your application as incomplete.
(2) Initial license fee for an operation (other than a child-placing agency or maternity home): $35	Before we accept your application	We will return your application as incomplete.
(3) Initial license fee for a child-placing agency or maternity home: $50	Before we accept your application	We will return your application as incomplete.
(4) Initial renewal fee for an operation (other than a child-placing agency or maternity home): $35	Before we renew your initial license	We will deny the renewal of your initial license if you do not pay your fee by your renewal date.
(5) Initial renewal fee for a child-placing agency or maternity home: $50	Before we renew your initial license	We will deny the renewal of your initial license if you do not pay your fee by your renewal date.
(6) Non-expiring license fee for an operation (other than a child-placing agency or maternity home): $35 + $1 per licensed capacity	Before we issue you a non-expiring license	We will deny your license if you do not pay your fee by your issuance due date.
(7) Non-expiring license fee for a child-placing agency: $100	Before we issue you a non-expiring license	We will deny your license if you do not pay your fee by your issuance due date.
(8) Non-expiring license fee for a maternity home: $50 + $2 per licensed capacity	Before we issue you a non-expiring license	We will deny your license if you do not pay your fee by your issuance due date.
(9) Annual license fee for an operation (other than a child-placing agency or maternity home): $35 + $1 per licensed capacity	On the anniversary date of your license	If you do not pay your fee when it is due, your license is automatically suspended until you pay your fee. However, if you do not pay your fee within three months after your anniversary, we may revoke your license.
(10) Annual license fee for a child-placing agency: $100	On the anniversary date of your license	If you do not pay your fee when it is due, your license is automatically suspended until you pay your fee. However, if you do not pay your fee within three months after your anniversary date, we may revoke your license.

(11) Annual license fee for a maternity home: $50 + $2 per licensed capacity	On the anniversary date of your license	We will: • Suspend your license if you do not pay your fee within one month after your anniversary date; and • Revoke your license if you do not pay your fee within three months after your anniversary date.
(12) Amendment fee for an operation (other than a maternity home) or child-placing agency: $1 for each child that the current licensed capacity is increased.	Before we issue your amendment	We will deny your request for an increase in capacity.
(13) Amendment fee for a maternity home: $2 for each client that the current licensed capacity is increased.	Before we issue your amendment	We will deny your request for an increase in capacity.
(14) Background check fee: $2 per person	At the time you request a background check or on a monthly or quarterly basis	We may suspend and/or revoke your license.

Figure: 40 TAC §745.693

Type of Criminal Conviction	Is This Person Eligible for a Risk Evaluation?	If This Person Is Eligible for a Risk Evaluation, May the Person be Present at a Child-Care Operation While Children are in Care Pending the Outcome of the Risk Evaluation?
(1) A felony conviction of an offense under Title 5, Title 6, Chapter 29 of Title 7, Chapter 43 or §42.072 of Title 9, §15.031 of Title 4, or §38.17 of Title 8 of the Texas Penal Code (TPC), or any like offense under the law of another state or federal law.	No, this person is permanently barred from being present at a child-care operation while children are in care.	Not applicable, because this person is not eligible for a risk evaluation.
(2) A misdemeanor conviction of an offense under Title 5, Title 6, Chapter 29 of Title 7, Chapter 43 or §42.072 of Title 9, §15.031 of Title 4, or §38.17 of Title 8 of the TPC, or any like offense under the law of another state or federal law.	No, for listed family homes and registered child-care homes this person is permanently barred from being present in the family home while children are in care. Yes, for all other types of child-care operations this person is eligible for a risk evaluation.	Not applicable for listed family homes and registered child-care homes, because this person is not eligible for a risk evaluation. Yes, for all other types of child-care operations, if we previously gave written approval for the person to remain at the operation with the same conviction in question.
(3) A felony or misdemeanor conviction committed within the last 10 years of an offense under the Texas Controlled Substances Act; the TPC, §39.04, §42.08, §42.09, §42.091, §42.092, §42.10, §46.13, or Chapter 49; the Texas Alcoholic Beverage Code, §106.06; or any like offense of the law of another state or federal law.	Yes, unless a foster or adoptive applicant has a felony conviction within the last five years for a drug-related offense; in that circumstance, federal law prohibits approval of a foster or adoptive home. 42 U.S.C. §671(a)(20)(A)(ii)	No if it's a felony conviction, unless we previously gave written approval for the person to remain in the operation with the same conviction in question. Yes, if it's a misdemeanor conviction.
(4) A felony conviction of an offense under any other title of the TPC, or any like offense under the law of another state or federal law that the person committed within the past ten years.	Yes	Yes, if we previously gave written approval for the person to remain in the operation with the same conviction in question.

(5) Any deferred adjudication of crimes listed above and the person has not completed probation.	Yes, for all offenses listed above that do not bar a person from being present in the operation while children are in care. No, for offenses listed above that bar a person from being present in an operation while children are in care.	Yes, for all offenses listed above that do not bar a person from being present in the operation while children are in care. No, for offenses listed above that bar a person from being present in an operation while children are in care.

Figure: 43 TAC §28.11(c)(3)(B)

Gross Weight in Pounds	**Highway Maintenance Fee**
80,001 - 120,000	$150 [~~$50~~]
120,001 - 160,000	$225 [~~$75~~]
160,001 - 200,000	$300 [~~$100~~]
200,001 - Above	$375 [~~$125~~]

Figure: 43 TAC §28.30(e)(3)(C)

Number of Counties on Permit Application	**Annual Fee**
1 - 5	$175
6 - 20 [~~1-20~~]	$250 [~~$125~~]
21 - 40	$450 [~~$345~~]
41 - 60	$625 [~~$565~~]
61 - 80	$800 [~~$785~~]
81 - 100	$900 [~~$1,005~~]
101 - 254	$1,000

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas Department of Agriculture

Request for Proposal: GO TEXAN Partner Program

Pursuant to the Texas Agriculture Code, §§46.001 - 46.013 and 4 Texas Administrative Code §§17.300 - 17.310, the Texas Department of Agriculture (the department) hereby requests proposals for GO TEXAN Partner Program (GOTEPP) projects for the period of January 1, 2008 through August 31, 2009. GOTEPP is a dollar-per-dollar matching fund promotion program designed to increase consumer awareness of Texas agricultural products and expand the markets for Texas agricultural products by developing a general promotional campaign for Texas agricultural products and advertising campaigns for specific Texas agricultural products based on project proposals submitted by successful applicants. GOTEPP project proposal application information can be obtained from the department's web site: www.GOTEXAN.org, or by contacting the Funding Coordinator for Marketing and Promotion at (512) 463-7731 or (512) 463-8382.

Eligibility. An eligible applicant must be a:

(1) state or regional organization or board that promotes the marketing and sale of Texas agricultural products and does not stand to profit directly from specific sales of agricultural commodities;

(2) a cooperative organization under 4 Texas Administrative Code §17.301;

(3) a state agency or board that promotes the marketing and sale of Texas agricultural products;

(4) a small business under 4 Texas Administrative Code §17.301; or

(5) any other entity that promotes the marketing and sale of Texas agricultural products.

An eligible applicant must also:

(1) be a product or restaurant member in good standing with the department's GO TEXAN program;

(2) meet the requirements in the GOTEPP Texas Administrative Code Rules and department guidelines, and

(3) be physically located or have their principal place of business in Texas. The department has the sole discretion to determine whether an applicant meets any GOTEPP eligibility requirements.

Project Proposal Requirements. GOTEPP applicants must submit a project proposal in accordance with the department guidelines. The project proposal must describe the advertising or other market-oriented promotional activities to be carried out if GOTEPP matching funds are granted to the applicant. The project proposal must also include:

(1) a cover page including the name, title, and address of applicant(s)/business owner(s);

(2) a table of contents for the project proposal;

(3) a one-page summary of 200 words or less that briefly describes the project proposal including the project's plan and methodology, and how this project will contribute to the enhancement of GO TEXAN program;

(4) a description of how this project is anticipated to benefit a specific region of the state or a specific commodity;

(5) a description, if any, of preliminary market research and sales percent increases to be achieved as a result of the project;

(6) a biography of the applicant and a description of the business entity;

(7) a detailed project budget including specific dollar amounts for all potential costs;

(8) a description of how the applicant will quantify and report to the department anticipated sales increases due to implementation of their GOTEPP project; and

(9) any other requirements in the GOTEPP guidelines.

Additionally, the applicant will have to submit sworn statements, on the form(s) provided by the department, stating that the applicant:

(1) is not currently delinquent in the payment of any franchise taxes owed to the State of Texas;

(2) is not delinquent in child support under the Texas Family Code §231.006;

(3) is not delinquent in a payment of a guaranteed student loan; and

(4) has disclosed any existing or potential conflict of interest relative to the evaluation of the project plan by the GOTEPP Advisory Board.

If applicant's project is accepted for consideration by the GOTEPP Advisory Board, then applicant is required to submit to the GOTEPP funding coordinator an additional ten copies to be distributed to the GOTEPP Advisory Board members.

All qualifying proposals will be evaluated by the GOTEPP Advisory Board appointed by the Commissioner of Agriculture. This panel consists of representatives from the following: the Texas Department of Agriculture, radio media, print media, television media, advertising, higher education, United States Department of Agriculture Commodity Credit Corporation (non-voting), Internet Web site or electronic commerce industry, the field of economic analysis, an agriculture producer representative and a consumer representative. Project proposals will be considered for funding award by the GOTEPP Advisory Board on a competitive basis. Preference will be given to project proposals that are unique in nature, avoid duplication with other projects already funded by the department, and enhance the department's GO TEXAN Program. The announcement of the GOTEPP project awards will be made at GOTEPP Advisory Board meetings. Meetings are held biannually; and additional meetings may be called by the Commissioner of Agriculture.

All approved projects must be completed by July 31, 2009, or the date specified in the grant agreements, whichever is earlier. Upon instruction of the GOTEPP funding coordinator, successful applicants will submit to the department the matching funds for their approved project within ten business days after receiving written notification requesting the matching funds. Matching funds may not be paid to the department by credit card and must be accompanied by an executed grant agreement.

All approved projects will be subject to audit and periodic reporting requirements.

Proposals should be submitted to: Debbie Wall, Funding Coordinator for Marketing and Promotion, Texas Department of Agriculture, 1700 North Congress Avenue, 11th Floor, Austin, Texas 78701. Ms. Wall may be contacted by telephone at (512) 463-7731 or by fax at 1-888-223-5717 for additional information about preparing the proposal. Proposals will be accepted by the department on a continuous basis until all available GOTEPP funds are depleted.

TRD-200800722
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: February 6, 2008

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 02/11/08 - 02/17/08 is 18% for Consumer[1]/Agricultural/Commercial [2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 02/11/08 - 02/17/08 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by §303.005[3] for the period of 02/01/08 - 02/29/08 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The monthly ceiling as prescribed by §303.005 for the period of 02/01/08 - 02/29/08 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

[3]For variable rate commercial transactions only.

TRD-200800676
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: February 4, 2008

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Texas Education Agency

Notice of Correction: Request for Applications Concerning the Collaborative Dropout Reduction Pilot Program

The Texas Education Agency (TEA) published Request for Applications (RFA) #701-08-129, Request for Applications Concerning the Collaborative Dropout Reduction Pilot Program, in the January 25, 2008, issue of the *Texas Register* (33 TexReg 766).

The TEA is amending the deadline for receipt of applications. Applications must be received in the TEA Document Control Center by 5:00 p.m. (Central Time), Thursday, April 10, 2008, to be eligible to be considered for funding. This correction reflects a change from the original deadline date of Tuesday, April 29, 2008.

Further Information. For clarifying information about the RFA, contact Carlos Garza, Division of Discretionary Grants, TEA, (512) 463-9269, or Chris Caesar, Division of State Initiatives, TEA, (512) 936-6060.

TRD-200800715
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: February 6, 2008

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that, before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **March 17, 2008**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512)239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on March 17, 2008**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing**.

(1) COMPANY: Ameriforge Corporation dba Forged Vessel Connections; DOCKET NUMBER: 2007-0577-IHW-E; IDENTIFIER: RN103037719; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: custom forging; RULE VIOLATED: 30 Texas Administrative Code (TAC) §335.2(b), by failing to dispose of Class 1 waste at an authorized facility; 30 TAC §335.10(a)(1), by failing to use the correct manifest when shipping Class 1 waste for disposal; 30 TAC §335.6(c), by failing to update the facility's notice of registration; 30 TAC §335.513, by failing to provide the required waste stream documentation for one waste stream; 30 TAC §335.9(a)(2), by failing to maintain a correct annual waste summary; and 30 TAC §335.10(c), by failing to list the correct Texas waste codes on Class 1 manifests; PENALTY: $3,102; ENFORCEMENT COORDINATOR: Dana Shuler, (512) 239-2505; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: Aradhana Texas, Inc. dba Mr. Convenience; DOCKET NUMBER: 2008-0082-PST-E; IDENTIFIER: RN101558765; LOCATION: Haltom City, Tarrant County, Texas;

TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(a)(1)(A), by failing to provide release detection; and 30 TAC §334.50(d)(1)(B), by failing to implement inventory control methods; PENALTY: $3,500; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Brazos River Authority and Lower Colorado River Authority; DOCKET NUMBER: 2007-1670-MWD-E; IDENTIFIER: RN100822600; LOCATION: Round Rock, Williamson County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010264002, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations for total suspended solids (TSS) carbonaceous biochemical oxygen demand, total ammonia nitrogen, and flow; PENALTY: $13,500; Supplemental Environmental Project (SEP) offset amount of $10,800 applied to Keep Texas Beautiful; ENFORCEMENT COORDINATOR: Libby Hogue, (512) 239-1165; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(4) COMPANY: Clara Hills Civic Association; DOCKET NUMBER: 2007-1537-PWS-E; IDENTIFIER: RN101208882; LOCATION: Burleson County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(4) and Texas Health and Safety Code (THSC), §341.0315(c), by exceeding the maximum contaminant level (MCL) for total trihalomethanes; PENALTY: $342; ENFORCEMENT COORDINATOR: Andrea Linson-Mgbeoduru, (512) 239-1482; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(5) COMPANY: Coming of Christ Full Gospel Church; DOCKET NUMBER: 2007-0770-PWS-E; IDENTIFIER: RN103010211; LOCATION: Italy, Ellis County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.39(h)(1), by failing to obtain written approval of plans and specifications prior to construction of a new public water system; 30 TAC §290.41(c)(3)(A), by failing to submit well completion data for commission review and approval; and 30 TAC §290.43(c), by failing to ensure all potable water storage facilities are covered and designed, fabricated, erected, tested, and disinfected in strict accordance with current American Water Works Association standards; PENALTY: $440; ENFORCEMENT COORDINATOR: Andrea Linson-Mgbeoduru, (512) 239-1482; REGIONAL OFFICE: 2301 Sanger Avenue, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: Eastman Cogeneration L.P.; DOCKET NUMBER: 2007-1737-AIR-E; IDENTIFIER: RN100542695; LOCATION: Longview, Harrison County, Texas; TYPE OF FACILITY: electric generating plant; RULE VIOLATED: 30 TAC §§101.20(1), 116.115(b)(2)(F) and (c), and 122.142(4), Federal Operating Permit Number O-02082, Special Terms and Conditions 1 and 8, Air Permit 39842, Special Condition 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $1,875; ENFORCEMENT COORDINATOR: Aaron Houston, (409) 898-3838; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(7) COMPANY: Mohammed Basheer dba Exxon 45; DOCKET NUMBER: 2007-1087-PST-E; IDENTIFIER: RN101814010; LOCATION: Galveston, Galveston County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.244(3) and THSC, §382.085(b), by failing to conduct monthly inspections of the Stage II vapor recovery system; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor underground storage tanks (USTs) for releases; and 30 TAC §334.50(d)(1)(B) and the Code, §26.3475(c)(1), by failing to conduct proper inventory control procedures for all USTs at the station; PENALTY: $7,850; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(8) COMPANY: ExxonMobil Oil Corporation; DOCKET NUMBER: 2007-1606-AIR-E; IDENTIFIER: RN102450756; LOCATION: Beaumont, Jefferson County, Texas; TYPE OF FACILITY: oil refinery; RULE VIOLATED: 30 TAC §101.4 and THSC, §382.085(b), by failing to prevent a nuisance condition; PENALTY: $10,000; Supplemental Environmental Project (SEP) offset amount of $5,000 applied to Texas Association of Resource Conservation and Development Areas, Inc. ("RC&D") - Clean School Buses; ENFORCEMENT COORDINATOR: Aaron Houston, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(9) COMPANY: Dornal L. Foust; DOCKET NUMBER: 2007-1559-LII-E; IDENTIFIER: RN103484259; LOCATION: Fort Worth and Arlington, Tarrant County, Texas; TYPE OF FACILITY: landscape irrigator business; RULE VIOLATED: 30 TAC §344.95(a), by failing to design an irrigation system, or portion thereof, so as to require the use of all component parts in a way which complies with the manufacturer's performance limitations for the part, unless the use is necessary to accommodate special site conditions; PENALTY: $131; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(10) COMPANY: Harlow Stores, Inc. dba Harlows 3; DOCKET NUMBER: 2008-0083-PST-E; IDENTIFIER: RN101553220; LOCATION: Melissa, Collin County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A), by failing to provide release detection; PENALTY: $1,750; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6971, (817) 588-5800.

(11) COMPANY: Neches Food Store; DOCKET NUMBER: 2007-1122-PST-E; IDENTIFIER: RN102363074; LOCATION: Bridge City, Orange County, Texas; TYPE OF FACILITY: property with USTs; RULE VIOLATED: 30 TAC §334.47(a)(2) and §334.54(d)(2), by failing to either permanently remove from service no later than 60 days after the prescribed implementation date, three USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements or ensure that any residue from stored regulated substances which remained in a temporarily out-of-service UST system did not exceed 2.5 centimeters at the deepest point and did not exceed 0.3 percent by weight of the system at full capacity; and 30 TAC §334.54(b), by failing to maintain all piping, pumps, manways, tank access points, and ancillary equipment in a capped, plugged, locked, and/or otherwise secured manner to prevent access, tampering, or vandalism by unauthorized persons; PENALTY: $7,875; ENFORCEMENT COORDINATOR: Philip DeFrancesco, (817) 588-5800; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(12) COMPANY: City of Redwater; DOCKET NUMBER: 2007-1723-MWD-E; IDENTIFIER: RN102179371; LOCATION: Redwater, Bowie County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0010926001, Effluent Limitations and Monitoring Requirements Numbers 1 and 2, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations for five-day biochemical oxygen demand, total chlorine residual, and TSS; PENALTY: $3,100; ENFORCEMENT COORDINATOR: Andrew Hunt, (512) 239-1203;

REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(13) COMPANY: City of Southside Place; DOCKET NUMBER: 2007-1440-PWS-E; IDENTIFIER: RN101178978; LOCATION: Harris County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(f)(1)(B) and THSC, §341.0315(c), by exceeding the acute MCL (AMCL) for fecal coliform; 30 TAC §290.109(g)(2) and §290.122(a)(2)(B), by failing to notify the commission within 24 hours of incurring an AMCL for fecal coliform and by failing to provide public notice for exceeding the AMCL for fecal coliform; and 30 TAC §290.122(a)(2)(B), by failing to issue a boil water notice; PENALTY: $2,571; Supplemental Environmental Project (SEP) offset amount of $2,571 applied to Texas Association of Resource Conservation and Development Areas, Inc. ("RC&") - Wastewater Treatment Assistance; ENFORCEMENT COORDINATOR: Andrea Linson-Mgbeoduru, (512) 239-1482; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(14) COMPANY: Star Fuels, Inc. dba Wallisville Texaco; DOCKET NUMBER: 2008-0088-PST-E; IDENTIFIER: RN102037363; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.221, by failing to have Stage 1 vapor recovery equipment; PENALTY: $1,750; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(15) COMPANY: Texas H2O, Inc.; DOCKET NUMBER: 2007-1454-PWS-E; IDENTIFIER: RN105197180; LOCATION: Granbury, Hood County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.39(h), by failing to receive written approval of plans and specifications prior to any construction of the public water system and make it available at the time of the investigation; 30 TAC §290.41(c)(3)(B), by failing to extend casing a minimum of 18 inches above the elevation of the finished floor of the pump room or natural ground surface; 30 TAC §290.41(c)(3)(J), by failing to provide the well with a concrete sealing block; 30 TAC §290.46(q)(1), by failing to issue a boil water notification to customers; 30 TAC §290.45(b)(1)(C)(iv) and (d)(2)(A)(ii) and THSC, §341.0315(c), by failing to provide an elevated storage capacity of 100 gallons per connection or a pressure tank capacity of 20 gallons per connection; 30 TAC §290.44(h)(1)(A), by failing to install backflow prevention assemblies or an air gap at all connection points; and 30 TAC §290.46(r), by failing to provide a minimum pressure of 35 pounds per square inch throughout the distribution system; PENALTY: $2,730; ENFORCEMENT COORDINATOR: Andrea Linson-Mgbeoduru, (512) 239-1482; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200800698
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 5, 2008

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Enforcement Orders

An agreed order was entered regarding Webb County, Docket No. 2003-0051-MLM-E on January 30, 2008 assessing $37,260 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kari Gilbreth, Staff Attorney, at (512) 239-1320, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Waco, Docket No. 2004-0191-MSW-E on January 30, 2008 assessing $18,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Craig Fleming, Enforcement Coordinator, at (512) 239-5806, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Mid-West Feed Yards, Inc., Docket No. 2004-1637-AGR-E on January 30, 2008 assessing $24,675 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lena Roberts, Staff Attorney, at (512) 239-0019, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Momentum Investment, Inc. dba Angels Gas & Grocery, Docket No. 2004-1701-PST-E on January 30, 2008 assessing $15,950 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lena Roberts, Staff Attorney, at (512) 239-0019, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Lorena, Docket No. 2005-0492-MWD-E on January 30, 2008 assessing $10,800 in administrative penalties with $2,160 deferred.

Information concerning any aspect of this order may be obtained by contacting Mike Meyer, Enforcement Coordinator, at (512) 239-4492, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Collinsville, Docket No. 2005-0502-MWD-E on January 30, 2008 assessing $3,820 in administrative penalties with $764 deferred.

Information concerning any aspect of this order may be obtained by contacting Pam Campbell, Enforcement Coordinator, at (512) 239-4493, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Kuang Phou dba Ken's Minit Market 3, Docket No. 2005-1053-PST-E on January 30, 2008 assessing $3,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Becky Combs, Staff Attorney, at (512) 239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Adolfo Tapia, Docket No. 2005-1654-AGR-E on January 30, 2008 assessing $13,104 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kari Gilbreth, Staff Attorney, at (512) 239-1320, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Dorothy L. Kranz dba Seven Bluff Cabins, Docket No. 2005-1798-PWS-E on January 30, 2008 assessing $2,925 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Becky Combs, Staff Attorney, at (512) 239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Mario Ramos and Olga Ramos, Docket No. 2006-0377-OSS-E on January 30, 2008 assessing $688 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Robert Mosley, Staff Attorney, at (512) 239-0627, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Paul Mullin dba Paul Mullin's Septic Tank Service, Docket No. 2006-0685-SLG-E on January 30, 2008 assessing $7,000 in administrative penalties with $5,800 deferred.

Information concerning any aspect of this order may be obtained by contacting Audra Ruble, Enforcement Coordinator, at (361) 825-3126, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Kelvin Ho aka Toan A. Ho dba Crystals Cleaners & Alterations, Docket No. 2006-0695-DCL-E on January 30, 2008 assessing $1,185 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mary Coleman, Staff Attorney, at (817) 588-5917, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Abdulaziz Ibrahim dba Specialty Cleaners, Docket No. 2006-0891-DCL-E on January 30, 2008 assessing $889 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mary Coleman, Staff Attorney, at (817) 588-5917, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Aguas Mart, L.L.C. dba A1 Dry Cleaners, Docket No. 2006-0994-DCL-E on January 30, 2008 assessing $1,185 in administrative penalties with $237 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator, at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hartley County, Docket No. 2006-0999-MLM-E on January 30, 2008 assessing $14,280 in administrative penalties with $2,856 deferred.

Information concerning any aspect of this order may be obtained by contacting Colin Barth, Enforcement Coordinator, at (512) 239-0068, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Zul Noorane dba Best Cleaners, Docket No. 2006-1213-DCL-E on January 30, 2008 assessing $1,185 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jacquelyn Boutwell, Staff Attorney, at (512) 239-5846, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Canyon Cleaners, Inc. dba Sienna Cleaners, Docket No. 2006-1389-DCL-E on January 30, 2008 assessing $1,185 in administrative penalties with $237 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator, at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Summit Dry Cleaners, Inc. dba Summit Cleaners, Docket No. 2006-1476-DCL-E on January 30, 2008 assessing $1,778 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Dinniah Chahin, Staff Attorney, at (512) 239-0617, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jose B. Juarez dba JB Cleaners, Docket No. 2006-1643-DCL-E on January 30, 2008 assessing $1,185 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Tracy Chandler, Staff Attorney, at (512) 239-0629, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ahmad B. Goushey, Docket No. 2006-1958-PST-E on January 30, 2008 assessing $15,000 in administrative penalties with $13,800 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator, at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Zulfiqar Ali dba Fuel Express 4, Docket No. 2007-0043-PST-E on January 30, 2008 assessing $4,340 in administrative penalties with $868 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator, at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Point, Docket No. 2007-0082-PWS-E on January 30, 2008 assessing $3,202 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Dinniah Chahin, Staff Attorney, at (512) 239-0617, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Leeco Properties, Inc., Docket No. 2007-0241-WQ-E on January 30, 2008 assessing $2,000 in administrative penalties with $400 deferred.

Information concerning any aspect of this order may be obtained by contacting Yuliya Dunaway, Enforcement Coordinator, at (210) 490-3096, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sam W. McWhorter, Docket No. 2007-0266-PST-E on January 30, 2008 assessing $7,875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Anna Cox, Staff Attorney, at (512) 239-0974, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Benbrook, LLC, Docket No. 2007-0371-MWD-E on January 30, 2008 assessing $10,126 in administrative penalties with $6,526 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator, at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Bayer MaterialScience LLC, Docket No. 2007-0400-AIR-E on January 30, 2008 assessing $38,233 in administrative penalties with $7,646 deferred.

Information concerning any aspect of this order may be obtained by contacting Nadia Hameed, Enforcement Coordinator, at (713) 767-3629, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sunoco, Inc. (R&M), Docket No. 2007-0484-AIR-E on January 30, 2008 assessing $8,950 in administrative penalties with $1,790 deferred.

Information concerning any aspect of this order may be obtained by contacting Nadia Hameed, Enforcement Coordinator, at (713) 767-3629, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Mexia, Docket No. 2007-0520-MWD-E on January 30, 2008 assessing $26,688 in administrative penalties with $5,337 deferred.

Information concerning any aspect of this order may be obtained by contacting John Shelton, Enforcement Coordinator, at (512) 239-2563, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ernest Hogue, Docket No. 2007-0597-PST-E on January 30, 2008 assessing $8,925 in administrative penalties with $7,725 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Greimel, Enforcement Coordinator, at (512) 239-5690, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Formosa Plastics Corporation, Texas, Docket No. 2007-0771-AIR-E on January 30, 2008 assessing $20,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator, at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Brookeland Fresh Water Supply District, Docket No. 2007-0772-MWD-E on January 30, 2008 assessing $7,770 in administrative penalties with $1,554 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator, at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Charley's Concrete Co., Ltd., Docket No. 2007-0807-IWD-E on January 30, 2008 assessing $6,790 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator, at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding K&M Broussard Co., Docket No. 2007-0808-MSW-E on January 30, 2008 assessing $262 in administrative penalties with $52 deferred.

Information concerning any aspect of this order may be obtained by contacting Clinton Sims, Enforcement Coordinator, at (512) 239-6933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Tejas Industries, Ltd., Docket No. 2007-0819-IWD-E on January 30, 2008 assessing $18,315 in administrative penalties with $3,663 deferred.

Information concerning any aspect of this order may be obtained by contacting Craig Fleming, Enforcement Coordinator, at (512) 239-5806, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Bobby G. Rowland Homes, Inc. dba Rowland & Donnell Homes, Docket No. 2007-0861-WQ-E on January 30, 2008 assessing $1,625 in administrative penalties with $325 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator, at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Transcontinental Gas Pipe Line Corporation, Docket No. 2007-0909-AIR-E on January 30, 2008 assessing $10,000 in administrative penalties with $2,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Audra Ruble, Enforcement Coordinator, at (361) 825-3126, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Gustine, Docket No. 2007-0916-PWS-E on January 30, 2008 assessing $1,165 in administrative penalties with $233 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Clausewitz, Enforcement Coordinator, at (210) 403-4012, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Steven L. Robinson, Docket No. 2007-0958-PST-E on January 30, 2008 assessing $5,250 in administrative penalties with $1,050 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Greimel, Enforcement Coordinator, at (512) 239-5690, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Houston Oaks Golf Management Company, L.P., Docket No. 2007-0990-MWD-E on January 30, 2008 assessing $5,859 in administrative penalties with $1,171 deferred.

Information concerning any aspect of this order may be obtained by contacting Libby Hogue, Enforcement Coordinator, at (512) 239-1165, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Moscow Water Supply Corporation, Docket No. 2007-1025-MWD-E on January 30, 2008 assessing $18,900 in administrative penalties with $3,780 deferred.

Information concerning any aspect of this order may be obtained by contacting Merrilee Hupp, Enforcement Coordinator, at (512) 239-4490, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Harbenger Enterprises, Inc., Docket No. 2007-1047-WQ-E on January 30, 2008 assessing $3,000 in administrative penalties with $600 deferred.

Information concerning any aspect of this order may be obtained by contacting Mike Meyer, Enforcement Coordinator, at (512) 239-4492, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Bloomington Independent School District, Docket No. 2007-1050-MWD-E on January 30, 2008 assessing $1,240 in administrative penalties with $248 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator, at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Printpack, Inc., Docket No. 2007-1070-IWD-E on January 30, 2008 assessing $3,060 in administrative penalties with $612 deferred.

Information concerning any aspect of this order may be obtained by contacting Heather Brister, Enforcement Coordinator, at (512) 239-1203, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding P Chem, Inc., Docket No. 2007-1083-IWD-E on January 30, 2008 assessing $3,960 in administrative penalties with $792 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator, at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Common Development Group 06, LTD., Docket No. 2007-1091-EAQ-E on January 30, 2008 assessing $13,500 in administrative penalties with $2,700 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator, at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Flint Hills Resources, LP, Docket No. 2007-1095-AIR-E on January 30, 2008 assessing $20,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator, at (713) 422-8931, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Chusei (U.S.A.), Inc. dba Quest Separation Technologies, Inc., Docket No. 2007-1098-IWD-E on January 30, 2008 assessing $7,750 in administrative penalties with $1,550 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator, at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Red Ewald, Inc., Docket No. 2007-1099-AIR-E on January 30, 2008 assessing $2,125 in administrative penalties with $425 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator, at (210) 403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Orange County Water Control and Improvement District No. 1, Docket No. 2007-1101-MWD-E on January 30, 2008 assessing $4,500 in administrative penalties with $900 deferred.

Information concerning any aspect of this order may be obtained by contacting Merrilee Hupp, Enforcement Coordinator, at (512) 239-4490, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Houston Marine Services, Inc., Docket No. 2007-1112-IWD-E on January 30, 2008 assessing $3,960 in administrative penalties with $792 deferred.

Information concerning any aspect of this order may be obtained by contacting Craig Fleming, Enforcement Coordinator, at (512) 239-5806, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Occidental Permian Ltd., Docket No. 2007-1116-PWS-E on January 30, 2008 assessing $292 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rebecca Clausewitz, Enforcement Coordinator, at (210) 403-4012, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Viking Pools, LLC, Docket No. 2007-1130-AIR-E on January 30, 2008 assessing $6,750 in administrative penalties with $1,350 deferred.

Information concerning any aspect of this order may be obtained by contacting Lindsey Jones, Enforcement Coordinator, at (512) 239-4930, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Merisol USA LLC, Docket No. 2007-1135-AIR-E on January 30, 2008 assessing $6,681 in administrative penalties with $1,336 deferred.

Information concerning any aspect of this order may be obtained by contacting James Nolan, Enforcement Coordinator, at (512) 239-6634, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Town & Country Food Stores, Inc. dba Town & Country 267, Docket No. 2007-1147-PST-E on January 30, 2008 assessing $7,650 in administrative penalties with $1,530 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator, at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Water World Fiberglass Pools (U.S.A.) Inc., Docket No. 2007-1161-AIR-E on January 30, 2008 assessing $2,850 in administrative penalties with $570 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator, at (210) 403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Comtex Dairies, L.L.C. Randi Lockwood Willis dba Comtex Diary, Docket No. 2007-1168-AGR-E on January 30, 2008 assessing $4,290 in administrative penalties with $858 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator, at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding James W. Clark II, Docket No. 2007-1170-WQ-E on January 30, 2008 assessing $750 in administrative penalties with $150 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Jecha, Enforcement Coordinator, at (512) 239-2576, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Custom Crushed Stone, Inc., Docket No. 2007-1187-MSW-E on January 30, 2008 assessing $10,000 in administrative penalties with $2,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Clinton Sims, Enforcement Coordinator, at (512) 239-6933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Enterprise Products Operating LLC, Docket No. 2007-1190-AIR-E on January 30, 2008 assessing $5,916 in administrative penalties with $1,183 deferred.

Information concerning any aspect of this order may be obtained by contacting Audra Ruble, Enforcement Coordinator, at (361) 825 3126, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hina Enterprises, Inc. dba OJS Mobil Mart, Docket No. 2007-1193-PST-E on January 30, 2008 assessing $6,100 in administrative penalties with $1,220 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Greimel, Enforcement Coordinator, at (512) 239-5690, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Forestar (USA) Real Estate Group Inc., Docket No. 2007-1199-EAQ-E on January 30, 2008 assessing $1,875 in administrative penalties with $375 deferred.

Information concerning any aspect of this order may be obtained by contacting Lynley Doyen, Enforcement Coordinator, at (512) 239-1364, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Optimum Calves, L.L.C. and Roger Gomez dba Optimum Claves, Docket No. 2007-1213-AGR-E on January 30, 2008 assessing $2,440 in administrative penalties with $488 deferred.

Information concerning any aspect of this order may be obtained by contacting Lynley Doyen, Enforcement Coordinator, at (512) 239-1364, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Bruce's, Inc., Docket No. 2007-1217-AIR-E on January 30, 2008 assessing $2,425 in administrative penalties with $485 deferred.

Information concerning any aspect of this order may be obtained by contacting Daniel Siringi, Enforcement Coordinator, at (409) 899-8799, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding NRG Texas LP, Docket No. 2007-1237-AIR-E on January 30, 2008 assessing $2,975 in administrative penalties with $595 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator, at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Love's Travel Stops & Country Stores, Inc. dba Love's Country Store 214, Docket No. 2007-1255-AIR-E on January 30, 2008 assessing $3,660 in administrative penalties with $732 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator, at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ya Razzak, Inc. dba Fast Trak, Docket No. 2007-1280-AIR-E on January 30, 2008 assessing $1,200 in administrative penalties with $240 deferred.

Information concerning any aspect of this order may be obtained by contacting Bryan Elliott, Enforcement Coordinator, at (512) 239-6162, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The Hertz Corporation dba Hertz Car Rental 2183 11, Docket No. 2007-1330-AIR-E on January 30, 2008 assessing $1,100 in administrative penalties with $220 deferred.

Information concerning any aspect of this order may be obtained by contacting Terry Murphy, Enforcement Coordinator, at (512) 239-5025, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding David E. Shivers dba Shan D Water Supply, Docket No. 2007-1370-PWS-E on January 30, 2008 assessing $354 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Epifanio Villareal, Enforcement Coordinator, at (210) 403-4033, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Fritz Industries, Inc., Docket No. 2007-1389-AIR-E on January 30, 2008 assessing $1,925 in administrative penalties with $385 deferred.

Information concerning any aspect of this order may be obtained by contacting Libby Hogue, Enforcement Coordinator, at (512) 239-1165, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Tige Boats, Inc., Docket No. 2007-1406-AIR-E on January 30, 2008 assessing $4,750 in administrative penalties with $950 deferred.

Information concerning any aspect of this order may be obtained by contacting Terry Murphy, Enforcement Coordinator, at (512) 239-5025, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Baylor College of Medicine, Docket No. 2007-1432-AIR-E on January 30, 2008 assessing $1,925 in administrative penalties with $385 deferred.

Information concerning any aspect of this order may be obtained by contacting Libby Hogue, Enforcement Coordinator, at (512) 239-1165, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding LGI HOMES, LTD., Docket No. 2007-1635-MWD-E on January 30, 2008 assessing $850 in administrative penalties with $170 deferred.

Information concerning any aspect of this order may be obtained by contacting Heather Brister, Enforcement Coordinator, at (512) 239-1203, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200800719
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 6, 2008

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Notice of Comment Period and Announcement of a Public Meeting on a Proposed New Air Quality Standard Permit and Amendments to the Existing Air Quality Standard Permit

The Texas Commission on Environmental Quality (TCEQ) is providing an opportunity for public comment and will conduct a public meeting to receive testimony concerning both a new Air Quality Standard Permit for Permanent Rock and Concrete Crushers and amendments to the Air Quality Standard Permit for Temporary Rock Crushers and Temporary Concrete Crushers proposed for issuance under the Texas Clean Air Act, Texas Health and Safety Code, §382.05195, Standard Permit, and Title 30 Texas Administrative Code (30 TAC) Chapter 116, Subchapter F, Standard Permits.

PROPOSED STANDARD PERMIT AND AMENDMENTS

The proposed standard permit for permanent rock and concrete crushers would be applicable to all rock crushers that process nonmetallic minerals or a combination of nonmetallic minerals at quarries, mines, aggregate handling facilities, concrete recycling sites, etc., on a permanent basis and meet the conditions of the standard permit. The proposed new Air Quality Standard Permit for Permanent Rock and Concrete Crushers would replace the current permit by rule (PBR) for rock crushers available under 30 TAC §106.142, Rock Crushers. This standard permit was developed to update technical requirements, provide clearer, more enforceable conditions, require recordkeeping that facilitates the determination of compliance, and update the authorization for these facilities to include statutory requirements for certain concrete crushers. In a separate commission action, 30 TAC §106.142 will be repealed and will be unavailable for use for new or modified crushing facilities upon issuance of this standard permit. Owners or operators of crushing facilities authorized by the PBR may continue to operate under the PBR unless the crusher is moved or modified.

During development of the Air Quality Standard Permit for Permanent Rock and Concrete Crushers, a review of the existing Air Quality Standard Permit for Temporary Rock Crushers and Temporary Concrete Crushers revealed the need for minor adjustments to this permit. The commission is proposing technical and administrative amendments to improve readability, flexibility, and enforceability of this standard permit. Requirements concerning emission limits, control requirements, and recordkeeping would not change substantively.

The New Source Review Program under 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, requires any person who plans to construct any new facility or to engage in the modification of any existing facility which may emit air contaminants into the air of the state to obtain a permit in accordance with 30 TAC §116.111, General Application, satisfy the *de minimis* criteria of 30 TAC §116.119, De Minimis Facilities or Sources, or satisfy the conditions of a standard permit, a flexible permit, or a PBR before any actual work is begun on the facility. A standard permit authorizes the construction of new facilities or modification of existing facilities that are similar in terms of operations, processes, and emissions.

The standard permit for permanent rock and concrete crushers is subject to the procedural requirements of 30 TAC §116.603, Public Participation in Issuance of Standard Permits, and the amendments to the standard permit for temporary rock and concrete crushers is subject to the requirements of 30 TAC §116.605, Standard Permit Amendment and Revocation. Both include a 30-day public comment period and a public meeting to provide an additional opportunity for public comment. Any person who may be affected by the emission of air pollutants from facilities that may be authorized under the standard permits is entitled to submit written or verbal comments regarding the proposed standard permits.

PUBLIC MEETING

A public meeting on the proposed new Air Quality Standard Permit for Permanent Rock and Concrete Crushers and the amendments to the Air Quality Standard Permit for Temporary Rock Crushers and Temporary Concrete Crushers will be held in Austin, Texas. The meeting will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion with the audience will not occur during the meetings; however, TCEQ staff will be available to discuss the standard permits 30 minutes prior to the meeting and staff will also answer questions after the meeting. The public meeting will be held on March 18, 2008, at 1:30 p.m. at the Texas Commission on Environmental Quality, Building E, Room 254S, 12100 Park 35 Circle, Austin.

PUBLIC COMMENT AND INFORMATION

Copies of the draft Air Quality Standard Permit for Permanent Rock and Concrete Crushers may be obtained from the TCEQ web site at *http://www.tceq.state.tx.us/assets/public/permitting/air/NewSourceReview/Mechanical/rc_sp.pdf*. Copies of the draft amendments to the Air Quality Standard Permit for Temporary Rock Crushers and Temporary Concrete Crushers may be obtained from the TCEQ web site at *http://www.tceq.state.tx.us/assets/public/permitting/air/NewSourceReview/Mechanical/tr_cc_sp.pdf*, or by contacting the Texas Commission on Environmental Quality, Office of Permitting, Remediation, and Registration, Air Permits Division, at (512) 239-1250. Comments may be mailed to Mr. Blake Stewart, Texas Commission on Environmental Quality, Office of Permitting, Remediation, and Registration, Air Permits Division, MC 163, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-1070. All comments should reference the appropriate standard permit(s) for rock crushers to which the comments apply. Comments must be received by March 21, 2008. To inquire about the submittal of comments or for further information, contact Mr. Stewart at (512) 239-6931. Si desea información en Español, puede llamar al (800) 687-4040.

Persons who have special communication or other accommodation needs who are planning to attend the public meeting should contact Mr. Stewart at (512) 239-6931. Requests should be made as far in advance as possible.

TRD-200800699
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: February 5, 2008

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Notice of Correction - Public Hearing on Proposed Revisions to 30 TAC Chapter 291

In the February 1, 2008, issue of the *Texas Register* (33 TexReg 997), the Texas Commission on Environmental Quality (commission) published a notice of public hearing on the proposed revisions to 30 TAC Chapter 291, Utility Regulations. The public hearing date was submitted in error as February 12, 2008. **The correct public hearing date is February 26, 2008**.

The commission will hold a public hearing on this proposal in Austin on February 26, 2008 at 2:00 p.m. at the Texas Commission on Environmental Quality Complex located at 12100 Park 35 Circle in Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, commission staff members will be available to informally discuss the proposal 30 minutes before the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact John Gaete, Office of Legal Services, at (512) 239-6091.

Comments may be submitted to John Gaete, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments*. File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2007-048-291-PR. The comment period closes March 3, 2008. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Tammy Holguin Benter, Water Supply Division, (512) 239-6136.

TRD-200800681
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: February 4, 2008

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Notice of District Petition

Notice issued January 29, 2008

TCEQ Internal Control No. 12042007-D01; SLP 288 and Rodeo Palms, LP, SLP 288 and Rodeo Palms II, LP, SLP 288 and Rodeo Palms III, LP, SLP 288 and Rodeo Palms IV, LP, and, SLP 288 and Rodeo Palms V, LP (Petitioners) filed a petition for creation of Brazoria County Municipal Utility District No. 43 (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioners are holder of title to a majority in value of the land to be included in the proposed District; (2) there are four lien holders, Joe E. Banneyer, South Freeway 100, Ltd., Joan Banneyer, James R. Goodrum and Cynthia J. Goodrum on some of the property to be included in the proposed District; (3) the proposed District will contain approximately an area of 243.79 acres located within Brazoria County, Texas; and (4) the proposed District is within the corporate boundaries of the City of Manvel, Texas, and no portion of land within the proposed District is within the corporate boundaries or extraterritorial jurisdiction of any other city, town, or village in Texas. By Resolution No. 2007-R-01, effective January 8, 2007, the City of Manvel, Texas, gave its consent to the creation of the proposed District. According to the petition, the Petitioners have conducted a preliminary investigation to determine the cost of the project and from the information available at the time, the cost of the project is estimated to be approximately $20,420,000.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

The TCEQ may grant a contested case hearing on the petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the Petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed District's boundaries. You may also submit your proposed adjustments to the petition. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court. Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Districts Review Team, at (512) 239-4691. Si desea información en Español, puede llamar al (512) 239-0200. General information regarding TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200800718
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 6, 2008

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Notice of Issuance of a New Air Quality Standard Permit for Sawmills

The Texas Commission on Environmental Quality (TCEQ or commission) is issuing a new standard permit for sawmills under Texas Health and Safety Code (THSC), Texas Clean Air Act, §382.05195, Standard Permit, and Title 30 Texas Administrative Code (30 TAC) Chapter 116, Subchapter F, Standard Permits. The standard permit for sawmills was effective February 6, 2008.

Copies of the standard permit for sawmills may be obtained from the TCEQ Web site at *http:www.tceq.state.tx.us/assets/public/permitting/air/NewSourceReview/Mechanical/sawmill_sp.pdf* or by contacting the TCEQ, Office of Permitting, Remediation, and Registration, Air Permits Division, at (512) 239-1250 or Beecher Cameron at (512) 239-1495.

OVERVIEW OF AIR QUALITY STANDARD PERMIT

The new air quality standard permit for sawmills will replace the current permit by rule (PBR) for sawmills available under 30 TAC §106.223, Saw Mills. The usefulness of the PBR as an authorization method is limited by the lack of lumber drying provisions. The standard permit would authorize lumber drying using a variety of methods that have been evaluated for protection of public health. All

other activities common to sawmills were also evaluated for their effect on air quality standards and potential for nuisance, resulting in required internal setbacks for equipment and stockpiles from the sawmill property line. The standard permit also contains fire prevention requirements. In a separate commission action, 30 TAC §106.223 will be repealed and will be unavailable for use on issuance of this standard permit.

PUBLIC NOTICE AND COMMENT PERIOD

As required by 30 TAC §116.603, Public Participation in Issuance of Standard Permits, the TCEQ published notice of the proposed standard permit in the *Texas Register* and newspapers of the largest general circulation in the following metropolitan areas: Austin, Dallas, Houston, and Lufkin. The notice was published on September 14, 2007; and the public comment period ended on October 19, 2007.

PUBLIC MEETING

The TCEQ held public meetings on the proposed standard permit for sawmills on September 10, 2007, and October 17, 2007, in Austin. A representative from the Texas Forestry Association (TFA) attended and discussed the proposal with the commission's staff but did not submit oral testimony.

ANALYSIS OF COMMENTS

During the public comment period that closed on October 19, 2007, the commission received comments from the United States Environmental Protection Agency (EPA) and the TFA.

The EPA noted that the standard permit allows on-site electric power generation for those facilities that cannot connect to the electric power grid and that the permit conditions in paragraph (1)(F)(ii) make it clear that modified sawmills cannot have emission increases in excess of a prevention of significant deterioration (PSD) or nonattainment threshold. It must be clear that a source cannot use the standard permit to avoid major new source review. The EPA commented that all equipment associated with on-site power generation, as regulated under paragraph (2)(L), should be considered in the potential to emit (PTE) determination.

The commission has changed the standard permit in response to this comment to emphasize that the standard permit cannot be used to authorize sources requiring PSD or nonattainment review or to avoid these reviews. The restriction in paragraph (1)(F)(ii) of the standard permit that prevents the use of the standard permit for the authorization of major sources applies to existing, modified, and new facilities.

The production limit in the standard permit of 25 million board-feet of lumber, restriction on operating hours, and control requirements establish limits on PTE and ensure that no federal New Source Review is triggered. The commission also considered on-site power generation when setting the production limits and operating hours of this standard permit. The commission's research indicates that the large majority of sawmills get their electric power from the grid and on-site power generation is the exception. Should a facility authorized under this standard permit require on-site power generation in excess of 10% of their operating hours, the power generation will require additional authorization through another standard permit or case-by-case minor New Source Review permit. The commission agrees with the EPA's comment on potential to emit and has changed paragraph (2)(L) of the standard permit to clarify that the use of on-site power generation must be included when determining federal program applicability.

The EPA commented that the commission must demonstrate that the initial issuance, and any subsequent revisions, of the standard permit will not interfere with attainment and maintenance of any ambient air quality standard and that the standard permit fails to identify pollutants authorized under the permit. The demonstration should include modeling assumptions and the number of affected facilities and their geographic concentration. The EPA commented that the commission should demonstrate how the production limit of 25 million board-feet of lumber ensures that an authorized facility will remain a minor source and that the permit should contain annual emission limits. The EPA also commented that the permit should contain hourly limits to prevent short term emission peaks.

The commission has changed the standard permit in response to this comment and has included a list of those pollutants authorized by this standard permit. The commission used the following modeling assumptions: (1) sawmill production equipment emissions, scrap loading source emissions, other equipment emissions at the site, and the direct heating method for wood drying were modeled as an area source and were evaluated for simultaneous emissions; (2) the indirect heating scenario assumed the heater source would be vented through a stack; and (3) all facilities were modeled assuming daytime (one hour prior to sunrise to one hour after sunset) only operations except for a wood dryer facility using fuel other than wood or bark, which may operate 24 hours per day. The predicted effects were compared to the national ambient air quality standard (NAAQS) for particulate matter 10 microns or less in diameter (PM_{10}), sulfur dioxide (SO_2), nitrogen oxides (NO_x), carbon dioxide (CO), the state property line standard for SO_2, and the TCEQ effects screening levels (ESL) for hardwood dust, softwood dust, and alpha-pinene up to the allowed production limit of 25 million board-feet per year. The results showed no interference with any NAAQS and demonstrated that adhering to the conditions of the standard permit protected human health without the need for annual or hourly limits. Additional modeling details can be found in the PROTECTIVENESS REVIEW section of this technical summary.

The analysis performed by the commission demonstrates that all sawmills authorized by this standard permit will not have emissions requiring federal New Source Review when considering all emission points involved in production, scrap loading, drying, and electric power generation if the production limit is observed. The standard permit contains recordkeeping requirements to verify production rates.

To remain consistent with commission procedures and state law, any subsequent revisions of the standard permit will go through the same evaluations to ensure protection of the NAAQS and local health effects. Sawmills operate primarily in the wooded areas of East Texas and are spread from the northeastern to southeastern regions. The modeling performed was conservative as it can apply to any geographical location in Texas. The commission estimates this standard permit will apply to 90 - 110 sites.

The EPA commented that the commission should discuss all factors considered in the modeling exercise that resulted in property line setback distances based on sawmill production rates. The EPA commented that the standard permit eliminates the setback requirements of the PBR applicable to sawmills. The EPA requested an explanation of how the new internal setback requirements are protective of human health.

The commission has not changed the standard permit in response to this comment. The commission's modeling demonstrated that there was no setback required for production equipment to protect human health except for the scrap loading point. The scrap

loading point is generally at a higher elevation, using either a conveyer system or a front-end loader raising sawdust into the bed of a dump truck. With either method, the increased elevation causes sawdust particles to remain airborne longer with greater concentrations; and subsequently, additional setback distance may be required of the scrap loading point beyond the 150-foot minimum. To further reduce the chance for nuisance, the standard permit contains a minimum setback of sawmill production equipment and stockpiles from the site property line of 150 feet as an additional restriction.

The EPA commented that the standard permit does not explain the commission's enforcement authority for violations of the permit. The EPA recommended that the commission include a provision explaining that any noncompliance with the permit is a violation of the state implementation plan (SIP) and state law and is grounds for permit suspension or revocation. The EPA also commented that the permit should contain reporting requirements for violations.

The commission has not changed the standard permit in response to this comment. The commission's authority for the use of permits for similar sources and the prohibition against unauthorized emissions exists in THSC, §382.05195, Standard Permit, and §382.085, Unauthorized Emissions Prohibited, respectively. Under THSC, §382.0513, Permit Conditions, the commission may establish and enforce permit conditions. It is not necessary that this authority be repeated in individual permits. Sawmill operators authorized under this standard permit are subject to all the rules of the commission and must report noncompliance with the standard permit under 30 TAC Chapter 101, Subchapter F, Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities.

The EPA requested that the commission identify the provisions of the standard permit that will meet 40 Code of Federal Regulations (CFR) §51.160(a) and the SIP approved sections of 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, to allow for an exemption from registration. The EPA commented that the proposed standard permit appears to eliminate the need for preconstruction approval.

The commission has not changed the standard permit in response to this comment. The standard permit contains limits on lumber production, restrictions on operating hours, and control requirements for production equipment and dryers. The commission modeled sawmill operations based on these restrictions and determined that these enforceable provisions of the standard permit protected the NAAQS and human health. This standard permit will serve as preconstruction authorization for new construction and modification. The commission will ensure that sawmill operators meet the conditions of this standard permit through its inspections.

The EPA commented that the standard permit appears to exempt sources from complying with emission standards in 30 TAC §116.610(2). The EPA also commented that the exemptions seem to apply to the prevention of circumvention and compliance with federal standards for hazardous air pollutants (HAPs) and Maximum Achievable Control Technology (MACT). The EPA requested that the permit be revised to include all of the provisions of Chapter 116, Subchapter F, or include an explanation of how the proposed condition meets SIP requirements concerning interference with ambient air quality standard attainment.

The commission has not changed the standard permit in response to this comment. The exemption does not apply to 30 TAC §116.610(a)(2) - (6), which are the paragraphs concerning the applicability of federal standards. In paragraph (1)(D) of the standard permit, the commission does exempt sawmill operators from the provisions of 30 TAC §116.610(a)(1). The emission limits of this paragraph are not needed due to the operational limits contained in this standard permit. The standard permit contains a production limit that meets the NAAQS and is protective of human health.

The EPA commented that the standard permit eliminates the need for a certification that the PTE for an authorized facility is below major source thresholds to avoid applicability of the Federal Operating Permits Program. The EPA commented that the standard permit should contain additional language ensuring that the site's PTE does not exceed major source thresholds.

The commission has changed paragraph (1)(D) of the standard permit in response to this comment. The commission has exempted sawmill operators from the registration requirements in 30 TAC §116.611(a) and (b), but will retain the requirement in (c) for the certification of emission rates below Federal Operating Permits Program thresholds, if needed.

The commission's evaluation demonstrated that particulate was the pollutant emitted at the greatest rate; and at the maximum authorized production rate of 25 million board-feet per year, a sawmill would emit approximately 40 tons per year. This is below major source thresholds. Other pollutants, including SO_2, NO_x, CO, and volatile organic compounds (VOC), were also evaluated and were below major source thresholds as well.

The EPA commented that the opacity limit in paragraph (2)(J) of the standard permit should specify a representative monitoring frequency. The EPA requested confirmation that the 20% limit will accurately reflect compliance with standards.

The commission has not changed the standard permit in response to this comment. Because of the low level of emissions expected of these sites and the predominance of natural gas-fired dryers, the commission determined that it would not require periodic checks of opacity limits from the sawmill operators who would otherwise be required to keep a certified observer on the site. The commission will rely on its periodic inspections to enforce opacity limits and control nuisances. The inspectors will use EPA Test Method 9 to determine compliance with the opacity standard.

The EPA commented that the permit should contain recordkeeping requirements for fuel types and particulate emissions for boilers and drying ovens and that all records required by the standard permit be retained for five years.

The commission agrees with the EPA and has added additional recordkeeping requirements for fuel in response to this comment. Paragraph (2)(K)(iii) of the standard permit establishes design requirements to address particulate concentration. The commission has not changed the two-year retention period for records. This period is consistent with minor New Source Review recordkeeping requirements and is sufficient for the commission to effectively enforce its standard permits.

The EPA commented that the standard permit should provide for the commission to deny its use and require a case-by-case determination as needed.

The commission has not changed the standard permit in response to this comment. Limits on the use of this standard permit are stated in section (1). Sawmill operators who cannot meet these restrictions are ineligible for the permit and must seek case-by-case permitting. If an inspection reveals violations of the standard permit conditions, the commission will pursue enforcement, which

could include voidance of the standard permit claim and the requirement to apply for a case-by-case permit.

The EPA commented that the commission should review federal rules concerning regulation of particulate matter less than 2.5 microns in diameter ($PM_{2.5}$) to ensure that the standard permit is consistent with those rules.

Consistent with EPA policy, the commission is using PM_{10} standards as a surrogate for $PM_{2.5}$. The commission has reviewed the policy document *Implementation of New Source Review Requirements in $PM_{2.5}$ Nonattainment Areas* dated April 5, 2005, and is satisfied the standard permit meets federal requirements.

The TFA requested flexibility in the operating hours in paragraph (2)(A) of the standard permit to allow larger sawmills to operate during hours of less expensive, off-peak electricity demand.

The commission has not changed the permit in response to this comment. The off-peak electricity demand hours are late night and early morning hours. The off-peak operating hours would increase the possibility of nuisance. The commission could not demonstrate the protectiveness of the standard permit during these hours and consequently established operating hours. Sawmill operators unable to comply with this requirement may seek case-by-case permitting, which allows consideration of different operating hours for individual sawmills.

The TFA requested an explanation of the sharp increase in the required setback for the scrap loading point beginning at production rates greater than 12 million board-feet. The increased setback greatly increases the required property for mills at or above this production level.

The commission has not changed the permit in response to this comment. The setback distances are based on the predicted concentrations associated with the sawmill emissions. The maximum predicted concentration occurs at a distance of 375 feet for emissions above 12 million board-feet per year. As the production rates increase, the concentrations remain above the ESL for hardwood particulate until there is sufficient dispersion throughout the greater volume resulting from increased distance from the emission point.

The TFA suggested that the commission add the production of wood chips to the list of authorized activities under the standard permit. The TFA also suggested the deletion of the words "or the manufacture of wood products" from paragraph (1)(B) because wood chips are sold as a wood product.

The commission agrees that the production of wood chips can be authorized under the existing restrictions of this standard permit and has changed the language in paragraph (1)(B) to allow the production of wood chips but prohibit the manufacture of other wood products.

The TFA requested that the 150-foot setback in paragraph (2)(D) of the standard permit apply only to sawdust piles and not piles of chips, bark, and scrap lumber, which are not easily dispersed by airflow.

The commission has not changed the standard permit in response to this comment. The setback distance is based on field observations and is intended to provide a buffer for particulate matter originating from piles of raw or scrap material and to reduce the chances for nuisances.

The TFA suggested that the PBR applicable to sawmills be retained as an alternate authorization method for some mills.

The commission has demonstrated that the standard permit is protective of human health and authorizes a greater range of sawmill activity. The commission may not be able to make this demonstration for all applications of the PBR, and the PBR did not address all sawmill operations. Based on these factors, it is no longer appropriate to keep it as an authorization method. Sawmills that were authorized under the PBR may retain that authorization provided they have not been modified and all operations have been authorized.

TRD-200800700
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: February 5, 2008

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Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **March 17, 2008**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on March 17, 2008**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO shall be submitted to the commission in **writing**.

(1) COMPANY: City of Harlingen; DOCKET NUMBER: 2006-1974-MLM-E; TCEQ ID NUMBER: RN102327509; LOCATION: 1.25 miles east of State Highway 448 on Farm-to-Market (FM) Road 106, Harlingen, Cameron County, Texas; TYPE OF FACILITY: closed municipal solid waste (MSW) landfill; RULES VIOLATED: 30 TAC §330.15(c), by failing to dispose of MSW at an authorized site; 30 TAC §330.125(a), by failing to maintain a copy of the post-closure maintenance plan at the MSW site, or an alternate location approved by the executive director; 30 TAC §330.463(a)(1), by failing to correct, as needed, lack of vegetative growth; 30 TAC §330.131 and MSW Permit Number 169, Provision E.1. Site Development and Operation, by failing to control access to a MSW site by means of artificial barriers, natural barriers, or a combination of both, appropriate to protect human health and safety and the environment; 30 TAC §330.465(b), by failing to submit to the executive director a request for revocation

of a site operational permit upon completion of the post-closure care period for the final unit at the site; 30 TAC §37.8021 and §330.507(b), by failing to demonstrate acceptable financial assurance for the costs of the post-closure care of the MSW landfill; and 30 TAC §101.4 and §111.201 and Texas Health and Safety Code (THSC), §382.085(a) and (b), by failing to comply with the general prohibition of outdoor burning in Texas by conducting the unauthorized burning of MSW and by failing to control the discharge of an air contaminant in such concentration and duration as to adversely affect human health or welfare, animal life, vegetation, or property or as to interfere with the normal use and enjoyment of animal life, vegetation, or property; PENALTY: $22,560; STAFF ATTORNEY: Jim Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(2) COMPANY: City of Wolfe City; DOCKET NUMBER: 2004-0072-MLM-E; TCEQ ID NUMBERS: RN101387579, RN102896255, and RN103016705; LOCATIONS: adjacent to Oyster Creek, approximately 0.5 mile south of City of Wolfe City and 0.3 mile east of State Highway 34; approximately 0.75 mile east of City of Wolfe City on FM Road 1563, south of Western City Reservoir, and east of City of Wolfe City; and approximately 0.5 mile east of State Highway 11 and County Road 1563, Hunt County, Texas; TYPE OF FACILITIES: wastewater treatment facility, surface water treatment plant, and sludge site; RULES VIOLATED: 30 TAC §290.46(e)(6)(A), by failing to operate the plant under the direct supervision of a licensed water works operator who holds a class B or higher surface water license; 30 TAC §290.46(e)(6)(C), by failing to have at least one class C or higher surface water operator on duty at the plant when it is in operation or equip the plant with continuous turbidity and disinfectant residual monitors with automatic plant shutdown and alarms to summon operators so as to ensure that the water produced continues to meet the commission's drinking water standards during periods when the plant is not staffed; 30 TAC §290.121(b)(1), by failing to provide a copy of a monitoring plan that includes information on the location of all sampling points in the distribution system; 30 TAC §290.46(n)(2), by failing to maintain an up-to-date map of the distribution system so that all valves and mains may be easily located during emergencies; 30 TAC §290.46(n)(1), by failing to maintain up-to-date engineering plans for the plant; 30 TAC §290.42(1), by failing to maintain an adequate up-to-date operations and maintenance manual; 30 TAC §290.46(f)(3)(A)(iii), by failing to maintain records of complaints; 30 TAC §290.46(f)(3), by failing to complete the surface water monthly operating reports in accordance with the current concentration time study dated August 8, 1994; 30 TAC §290.42(j), by failing to ensure all chemicals and any replacement or additional process media used in the treatment of water supplied by public water systems conforms to American National Standards Institute/National Sanitation Foundation standard 60 for direct additives; 30 TAC §290.44(h), by failing to ensure that connections meeting the definition of high health hazards pursuant to 30 TAC §290.38(22) have properly installed backflow prevention devices, unless an adequate cross-connection control program exists; 30 TAC §290.46(j), by failing to conduct customer service inspections prior to providing continuous water service to new construction; 30 TAC §290.46(s)(1), by failing to calibrate the raw, backwash, and finished water meters at least annually; 30 TAC §290.46(s)(2)(B)(iv), by failing to calibrate the on-line turbimeters at least once per week; 30 TAC §290.46(s)(2)(C)(ii), by failing to calibrate the continuous disinfectant residual analyzers once every 90 days using chlorine solutions of known concentrations; 30 TAC §290.46(m)(4), by failing to maintain all distribution system lines and related appurtenances in a watertight condition; 30 TAC §290.41(e)(2)(C), by failing to establish 200-foot radius restricted zones prohibiting all recreational activities and trespassing in the area about the surface water intake structures on the East Lake and West Lake; 30 TAC §290.110(b)(1), by failing to meet acceptable treatment technique requirements for disinfectant concentrations; 30 TAC §290.42(f)(2)(D), by failing to ensure that the chemical feeder is designed to minimize the possibility of leaks and spills; 30 TAC §290.42(f)(2)(A), by failing to provide a chemical feeder in reserve or a standby unit for chlorine, caustic, and polymer; 30 TAC §290.42(d)(13), by failing to identify the influent, effluent, waste backwash, and chemical feed lines by the use of labels or various colors of paint; 30 TAC §290.42(d)(11)(D)(i), by failing to equip each filter with a manually adjustable rate-of-flow controller with rate-of-flow indication or flow control valves with indicators; 30 TAC §290.42(d)(11)(E)(i), by failing to provide each filter with an operational sample tap so that the effluent turbidity of the filer can be individually monitored; 30 TAC §290.42(e)(3)(D), by failing to provide facilities for determining the amount of disinfectant used daily as well as the disinfectant remaining for use; 30 TAC §290.46(m), by failing to initiate a maintenance program to maintain the general appearance of the plant's facilities and equipment; 30 TAC §290.45(b)(2)(C), by failing to provide a minimum transfer pump capacity of 0.6 gallons per minute per connection with the largest pump out of service; 30 TAC §290.45(b)(2)(A), by failing to provide a raw water pumping capacity of 0.6 gallons per minute per connection with the largest pump out of service; 30 TAC §290.41(e)(5), by failing to secure the East Lake raw water pump station within a locked building; 30 TAC §290.41(c)(3)(N), by failing to provide an operational flow meter to measure production yields and provide for the accumulation of water production data on the emergency well pump discharge line; 30 TAC §290.113(f)(4) and THSC, §341.0315(c), by exceeding the running annual average of 0.080 milligram per liter during the second-fourth quarters of 2004 and the first-third quarters of 2005; 30 TAC §305.125(1) and (5), Texas Water Code (TWC), §26.121, and Texas Pollutant Discharge Elimination System (TPDES) Permit Number 10383-001, Permit Condition Number 2.g., by failing to prevent a discharge or disposal of wastewater into or adjacent to waters in the state at any locations not permitted as an outfall; 30 TAC §305.125(9)(B) and TPDES Permit Number 10383-001, Monitoring and Reporting Requirement Number 7.a., by failing to provide verbal notification to the executive director for an unauthorized discharge within 24 hours of the discharge; 30 TAC §317.7(e), by failing to properly secure the facility; 30 TAC §317.3(a), by failing to properly secure the Spencer lift station; 30 TAC §30.331(b) and §30.350(c) and TPDES Permit Number 10383-001, Operational Requirement Number 9, by failing to employ a licensed operator to operate the facility; 30 TAC §317.4(a)(8), by failing to provide a backflow prevention device; 30 TAC §305.125(1) and (11)(B) and TPDES Permit Number 10383-001, Monitoring and Reporting Requirement Number 3.b., by failing to maintain monitoring records required by the permit; 30 TAC §305.125(1), TWC, §26.121, and TPDES Permit Number 10383-001, Final Effluent Limitations and Monitoring Requirements Numbers 3 and 6, by failing to maintain compliance with the permitted effluent limits listed; 30 TAC §305.125(5) and TPDES Permit Number 10383-001, Operational Requirement Number 1, by failing to properly maintain the facility; 30 TAC §305.125(1) and TPDES Permit Number 10383-002, Effluent Limitations and Monitoring Requirements Number 1 and 2, by failing to conduct required monitoring of effluent discharged from Outfall 001; 30 TAC §305.125(11)(B) and TPDES Permit Number 10383-002, Monitoring and Reporting Requirement Number 1, by failing to submit a monthly effluent report each month by the 20th day of the following month for the discharge described by the permit whether or not a discharge is made for that month; TWC, §26.121(a)(1) and TCEQ Sludge Registration Number 730055, Standard Provision Number V.D.2., by failing to prevent an unauthorized discharge of water treatment plant sludge; and 30 TAC §312.123

and TCEQ Sludge Registration Number 730055, Standard Provision Number V.C., by failing to submit an annual report for the period of August 1, 2001 - July 31, 2002 that includes the registration number of the disposal facility and the amount of sludge that has been disposed of on the site; PENALTY: $70,361; STAFF ATTORNEY: Justin Lannen, Litigation Division, MC R-4, (817) 588-5927; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Haider A., Inc. dba Stop In Food Mart; DOCKET NUMBER: 2006-1928-PST-E; TCEQ ID NUMBER: RN102867678; LOCATION: 8500 Old Galveston Road, Houston, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.49(c)(2)(C) and (c)(4) and TWC, §26.3475(d), by failing to inspect the impressed current cathodic protection system at least once every 60 days to ensure that the rectifier and other system components are operating properly and by failing to inspect and test the cathodic protection system for operability and adequacy of protection at a frequency of at least once every three years; and 30 TAC §334.50(a)(1)(A), (b)(2), and (b)(2)(A)(i)(III) and TWC, §26.3475(a) and (c)(1), by failing to have a release detection method capable of detecting a release from any portion of the underground storage tank (UST) system which contained regulated substances, by failing to provide proper release detection for the pressurized piping associated with the USTs, and by failing to test the line leak detectors at least once per year for performance and operational reliability; PENALTY: $4,500; STAFF ATTORNEY: Patrick Jackson, Litigation Division MC 175 (512) 239-6501; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(4) COMPANY: Jaime Garcia; DOCKET NUMBER: 2006-0077-MSW-E; TCEQ ID NUMBER: RN104799101; LOCATIONS: the intersection of Highway 281 and County Road 285, Falfurrias, Brooks County and 3/4 mile west of County Road 206, on County Road 410, Jim Wells County, Texas; TYPE OF FACILITIES: vacant building that was demolished and an unauthorized site; RULES VIOLATED: 30 TAC §330.15(c), by causing, suffering, allowing, or permitting the dumping or disposal of MSW, including demolition debris, at an unauthorized facility; PENALTY: $3,000; STAFF ATTORNEY: Alfred Oloko, Litigation Division, MC R-12, (713) 422-8918; REGIONAL OFFICE: Corpus Christi Regional Office, 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(5) COMPANY: John Cushman dba Sun Cleaners; DOCKET NUMBER: 2006-1227-DCL-E; TCEQ ID NUMBER: RN104992102; LOCATION: 1888 Barker Cypress Road, Houston, Harris County, Texas; TYPE OF FACILITY: dry cleaner drop station; RULES VIOLATED: 30 TAC §337.10(a) and THSC, §374.102(a), by failing to complete and submit the required registration form to the commission prior to operating a dry cleaning drop station; PENALTY: $945; STAFF ATTORNEY: Anna Cox, Litigation Division, MC 175, (512) 239-0974; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(6) COMPANY: Mannesmann DMV Stainless USA, Inc. fka DMV Stainless USA, Inc.; DOCKET NUMBER: 2006-1577-AIR-E; TCEQ ID NUMBER: RN100210962; LOCATION: 12050 West Little York Road, Houston, Harris County, Texas; TYPE OF FACILITY: stainless tubing and piping production plant; RULES VIOLATED: 30 TAC §122.146(3), THSC, §382.085(b), and Federal Operating Permit Number O-01340, General Terms and Conditions, by failing to submit a complete annual compliance certification for Federal Operating Permit Number O-01340 in a timely manner; PENALTY: $3,225; STAFF ATTORNEY: Tracy Chandler, Litigation Division, MC 175, (512) 239-0629; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(7) COMPANY: MZEE, Inc. dba Key Truck Stop; DOCKET NUMBER: 2004-0285-PST-E; TCEQ ID NUMBER: RN101249498; LOCATION: 17124 Interstate Highway 10 East, Channelview, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.242(3) and (3)(H) and §115.245(2) and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system in proper condition; and 30 TAC §334.50(b)(2)(A)(i), (b)(1)(A), and (d)(1)(B)(ii) and TWC, §26.3475(a), by failing to properly record inventory volume measurements of regulated substance inputs, withdrawals, and the amount remaining in the tank each operational day and by failing to conduct proper reconciliation of detailed inventory control records on a monthly basis; PENALTY: $5,775; STAFF ATTORNEY: Jim Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

TRD-200800689
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 5, 2008

Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations, the proposed penalty, and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **March 17, 2008**. The commission will consider any written comments received; and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on March 17, 2008**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers;

however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing**.

(1) COMPANY: Aguado Stone Incorporated; DOCKET NUMBER: 2006-2258-MLM-E; TCEQ ID NUMBER: RN105086110; LOCATION: 3601 County Road 239, Georgetown, Williamson County, Texas; TYPE OF FACILITY: limestone quarry consisting of approximately 200.87 acres; RULES VIOLATED: 30 TAC §213.4(a)(1), by failing to submit an Edwards Aquifer Protection Plan for commission approval prior to conducting regulated activities on the Edwards Aquifer Recharge Zone; 30 TAC §327.5(a), by failing to immediately abate and contain a spill or discharge; 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations §122.26(c), by failing to obtain authorization to discharge storm water associated with stone quarry activities at the facility; 30 TAC §334.127(a), by failing to register aboveground storage tanks with the agency on authorized agency forms; 30 TAC §111.201 and Texas Health and Safety Code (THSC), §382.085(b), by failing to comply with the general prohibition on outdoor burning at the facility; and 30 TAC §330.15(c), by failing to prevent the disposal of municipal solid waste at an unauthorized facility; PENALTY: $95,000; STAFF ATTORNEY: Lena Roberts, Litigation Division, MC 175, (512) 239-0019; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(2) COMPANY: Anna Jeffcoat dba Lakeshore Sites Water Company; DOCKET NUMBER: 2007-1565-PWS-E; TCEQ ID NUMBER: RN101207108; LOCATION: 792 Jeffcoat Road, Haskell, Haskell County, Texas; TYPE OF FACILITY: public water system (PWS); RULES VIOLATED: 30 TAC §290.42(d)(11)(B)(vi) and THSC, §341.0315(c), by failing to provide a minimum treatment plant capacity of 0.6 gallons per minute per connection, with the largest pump out of service; 30 TAC §290.41(e)(2)(C), by failing to post a sign in plain view at the raw water intake location that notifies the public of the 200 foot restricted zone and the activities prohibited within the zone; 30 TAC §290.46(t), by failing to post a legible sign at the terminal reservoir location that includes the name of the water supply and an emergency phone number where a responsible official can be contacted; 30 TAC §290.111(c)(1)(B), by failing to monitor the turbidity of the combined filter effluent and record the turbidity value every 15 minutes; 30 TAC §290.46(s)(2)(B)(iv), by failing to conduct a calibration check on the on-line turbidimeters at least once per week; 30 TAC §290.121(a), by failing to maintain an up-to-date chemical and microbiological monitoring plan for the water system; 30 TAC §290.42(d)(15)(C)(vi), by failing to provide the jar testing equipment that is necessary for determining the optimum coagulant dose; 30 TAC §290.42(d)(13), by failing to identify the influent, effluent, waste backwash, and chemical feed lines throughout the surface water treatment facility by using labels or various colors of paint; 30 TAC §290.42(d)(2)(E), by failing to provide an air gap connection on the filter-to-waste line at the surface water treatment facility; 30 TAC §290.43(c)(2), (c)(4), and (c)(6), by failing to design, construct, and maintain the clearwell in accordance with the American Water Works Association standards; 30 TAC §290.42(k)(2), by failing to maintain a risk management plan for the water system that conforms to the United States Environmental Protection Agency requirements; 30 TAC §290.46(e)(6)(A), by failing to employ an operator who holds a minimum of a Class C surface water license when the system employs only a part-time operator with a Class B surface water license; and 30 TAC §290.46(f)(3)(B)(v), by failing to maintain complete calibration records for the laboratory equipment, flow meters, rate of flow controllers, on-line turbidimeters, and on-line disinfectant residual analyzers; PENALTY: $2,554; STAFF ATTORNEY: Ben Thompson, Litigation Division, MC 175, (512) 239-1297; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(3) COMPANY: Barbara Miller dba Turner Water Service; DOCKET NUMBER: 2007-1107-PWS-E; TCEQ ID NUMBER: RN101243129; LOCATION: 531 Marilyn Street, Fresno, Fort Bend County, Texas; TYPE OF FACILITY: PWS; RULES VIOLATED: 30 TAC §290.109(c)(2)(A)(ii) and THSC, §341.033(d), by failing to collect and submit routine monthly water samples for bacteriological analysis for any month of the years 2005 - 2006, nor the months of January - April of the year 2007; 30 TAC §290.122(c)(2)(A), by failing to provide public notice of failure to collect and submit samples for any month of the years 2005-2006, nor the months of January - April of the year 2007; and 30 TAC §290.51 and Texas Water Code, §5.702, by failing to pay water system fees and all associated late fees for TCEQ Financial Administrative Account Number 0090790190 for Fiscal Years 1994-2007; PENALTY: $29,750; STAFF ATTORNEY: Patrick Jackson, Litigation Division MC 175 (512) 239-6501; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(4) COMPANY: Denton Center Cleaner, Inc. dba South Side Cleaners; DOCKET NUMBER: 2006-1854-DCL-E; TCEQ ID NUMBER: RN103200424; LOCATION: 1409 South Lamar Street, Suite 1005, Dallas, Dallas County, Texas; TYPE OF FACILITY: dry cleaning drop station; RULES VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the facility's registration by completing and submitting the required registration form to the TCEQ for a dry cleaning and/or drop station facility; PENALTY: $1,185; STAFF ATTORNEY: Mary E. Coleman, Litigation Division MC R-4, (817) 588-5917; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: Mubeen Enterprise, Inc. dba Spotless Cleaners; DOCKET NUMBER: 2006-1251-DCL-E; TCEQ ID NUMBER: RN104996459; LOCATION: 1550 Kenforest Drive, Missouri City, Fort Bend County, Texas; TYPE OF FACILITY: dry cleaning drop station; RULES VIOLATED: 30 TAC §337.10(a) and THSC, §374.102(a), by failing to complete and submit the required registration form to the TCEQ for a dry cleaning and/or drop station facility; PENALTY: $1,185; STAFF ATTORNEY: Mary E. Coleman, Litigation Division, MC R-4, (817) 588-5917; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(6) COMPANY: Naseer Ahmad dba Super Stop 3; DOCKET NUMBER: 2007-0094-PST-E; TCEQ ID NUMBER: RN101444081; LOCATION: 2745 Evangeline Drive, Vidor, Orange County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.10(b), by failing to maintain all underground storage tank records and make them immediately available for inspection to commission personnel upon request; 30 TAC §334.7(d)(3), by failing to provide written notice of any change or additional information to the commission within 30 days from the date of the occurrence of the change or addition, or within 30 days of the date on which the owner or operator first becomes aware of the change or addition; and 30 TAC §115.242(3)(A) and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system in proper operating condition and free of defects including the absence or disconnection of any component that is a part of the approved system; PENALTY: $4,110; STAFF ATTORNEY: Tracy Chandler, Litigation Division, MC 175, (512) 239-0629; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(7) COMPANY: Tuan Ngoc Nguyen dba Memorial Cleaners; DOCKET NUMBER: 2006-1271-DCL-E; TCEQ ID NUMBER:

RN102897246; LOCATION: 13610 Memorial Drive, Houston, Harris County, Texas; TYPE OF FACILITY: dry cleaning facility; RULES VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration form to the TCEQ for a dry cleaning and/or drop station facility; PENALTY: $1,185; STAFF ATTORNEY: Patrick Jackson, Litigation Division, MC 175, (512) 239-6501; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

TRD-200800690
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 5, 2008

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 106

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony concerning proposed revisions to 30 TAC Chapter 106, Permits by Rule, under the requirements of Texas Health and Safety Code, §382.017; and Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would repeal the permits by rule (PBRs) for rock crushers, asphalt concrete plants and sawmills. The asphalt concrete plant PBR has not been available for use since 2003, and the sawmill PBR is being replaced with a standard permit.

The commission will hold a public hearing on this proposal in Austin on March 18, 2008 at 10:00 a.m. at the Texas Commission on Environmental Quality Complex located at 12100 Park 35 Circle in Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, commission staff members will be available to informally discuss the proposal 30 minutes before the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Kristin Smith, Office of Legal Services, at (512) 239-0177.

Comments may be submitted to Kristin Smith, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments.* File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2007-011-106-PR. The comment period closes March 21, 2008. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Blake Stewart, Air Permits Division, at (512) 239-6931.

TRD-200800610
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: February 1, 2008

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 335

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed repeals and additions to 30 TAC Chapter 335, Industrial Solid Waste And Municipal Hazardous Waste.

The proposed rulemaking would change the subchapter name; add and expand exclusions; allow the executive director to waive requirements for disasters or emergencies; update requirements for notifications to the commission on collections; remove the requirement to submit operation plans to the commission and require that the plans be followed during collections and used for training; specify who is responsible for meeting certain requirements; update provisions for proper transportation and disposal of wastes; require recordkeeping for three years and reports on the amounts of wastes collected; provide provisions for the use of mobile collection units, and revise provisions for point of generation pick-up services; note other federal and state regulations that may apply to collections; clarify and augment training requirements for specific collection duties; restrict shipment of Household Hazardous Waste (HHW) to facilities that are authorized to accept it, and remove requirements on how those facilities handle the waste; and clarifying that HHW offered for reuse remains HHW if it is disposed rather than accepted for reuse.

A public hearing on this proposal will be held in Austin, Texas, on March 11, 2008, at 10:00 a.m., in Building F, Room 2210, at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments. Registration begins 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. A time limit may be established to assure enough time is allowed for every interested person to speak. There will be no open discussion during the hearing; however, commission staff members will be available for discussion 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons planning to attend the hearing, who have special communication or other accommodation needs, should contact John Gaete, Office of Legal Services, at (512) 239-6091. Requests should be made as far in advance as possible.

Comments may be submitted to John Gaete, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments*. File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2007-005-335-AD. The comment period closes March 16, 2008. To view rules, please visit *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information or questions concerning this proposal, please contact Joseph Thomas, Small Business and Environmental Assistance Division, at (512) 239-0012.

TRD-200800622
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: February 1, 2008

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 337

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony concerning proposed revisions to 30 TAC Chapter 337, Dry Cleaner Environmental Response, under the requirements of Texas Health and Safety Code, §382.017; and Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would implement House Bill 3220, 80th Legislature, 2007, Regular Session. The proposed rulemaking would establish new registration requirements for owners and preceding owners of real property on which a dry cleaning facility or drop station is or was located, who wish to obtain eligibility for Dry Cleaning Facility Release Fund benefits; would establish procedures for an owner of a non-participating drop station to move the business to another location and retain the drop station's non-participating status; and would provide that, following the completion of corrective action at a site under 30 TAC Chapter 337, a written notice will be filed in the real property records of the county or counties in which the site is located to notify future property owners that, pursuant to Texas Health and Safety Code, §374.1535, perchloroethylene may not be used at that site. In addition, certain rule amendments are being proposed to facilitate more efficient administration and enforcement of Texas Health and Safety Code, Chapter 374.

The commission will hold a public hearing on this proposal in Austin on March 11, 2008, at 10:00 a.m. at the Texas Commission on Environmental Quality Complex located at 12100 Park 35 Circle in Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, commission staff will be available to informally discuss the proposal 30 minutes before the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact John Gaete, Office of Legal Services, at (512) 239-6091.

Comments may be submitted to John Gaete, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments*. File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2007-035-337-PR. The comment period closes March 17, 2008. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Don Kennedy, Registration and Reporting Unit, at (512) 239-2154.

TRD-200800619
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 1, 2008

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Notice of Water Quality Applications

The following notices were issued during the period of January 23, 2008 through January 30, 2008.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

CITY OF EMORY has applied for a renewal of TPDES Permit No. WQ0010082001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. The facility is located on the west side of Willow Springs Road, approximately 0.5 mile south of the intersection of U.S Highway 69 and State Highway 19 in Rains County, Texas.

GARRETT CREEK RANCH INC has applied for a renewal of TPDES Permit No. WQ0013427001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 8,020 gallons per day. The facility is located approximately 1.5 miles east of Farm Road 2123 and 3.5 miles southwest of the City of Paradise in Wise County, Texas.

HOCKLEY RAIL CAR INC has applied for a renewal of TPDES Permit No. WQ0013472001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 6,000 gallons per day. The facility is located at 17000 Premium Drive, immediately north of Betke Road between Premium Drive and Kermie Road, west of the City of Hockley in Harris County, Texas.

JIMMY GAYLON BEYER has applied for a renewal of, and conversion to an individual permit, Texas Pollutant Discharge Elimination System (TPDES) Registration No. WQ0003234000, for a Concentrated Animal Feeding Operation (CAFO), to authorize the applicant to operate an existing dairy cattle facility at a maximum capacity of 990 head, of which all head are milking cows. The facility is located on the south side of the intersection of Farm-to-Market Road 219 and Farm-to-Market Road 2303; said intersection is approximately five miles northeast of the city of Lingleville in Erath County, Texas.

PANDA SHERMAN ETHANOL LP which proposes to operate an ethanol production plant, has applied for a new permit, Proposed Permit No. WQ0004825000 to authorize the disposal of treated wastewater consisting of Regeneration Thermokinetic Condenser blowdown and main condenser blowdown (cooling tower and boiler blowdown) at a volume not to exceed 144,000 gallons per day via irrigation of 80 acres. This permit will not authorize a discharge of pollutants into water in the State. The facility and land application site will be located approximately 4.5 miles northwest of the City of Stratford and west of and adjacent to U.S. Highway 287 in Sherman County, Texas.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200800716
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 6, 2008

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Notice of Water Rights Applications

Notice issued February 1, 2008

APPLICATION NO. 12185; The Quanah Country Club, Applicant, P.O. Box 86, Quanah, Texas 79252-0086, has applied for a Water Use Permit to maintain two existing dams and reservoirs, known as North Lake and South Lake, both on an unnamed tributary of Groesbeck Creek for in-place recreational purposes; construct and maintain a tank

pond, known as Holding Pond 1, on an unnamed tributary of Spring Creek and use the bed and banks of the pond for storage and subsequent diversion; and construct and maintain a pit pond, known as Holding Pond 2, on an unnamed tributary of Groesbeck Creek for in-place recreational and livestock purposes and use the bed and banks of the pond for storage and subsequent diversion of treated effluent for agricultural (irrigation) purposes, in the Red River Basin, Hardeman County. More information on the application and how to participate in the permitting process is given below. Notice of this application was mailed on January 3, 2008 to the water right holders of record in the Red River Basin. Prior to the publication of that notice, it was noted that the notice contained several errors as follows: (1) referencing Section 124 in the bearing of North Lake and South Lake; (2) referencing the southeast corner of the Section in the bearing for Holding Pond 2 and Diversion Point 2; and (3) referencing the incorrect Latitude and Longitude for Diversion Point No. 1. Therefore, this revised notice is being published and mailed to all water right holders of record in the Red River Basin. The application was received on April 11, 2007. Additional information and fees were received on June 25 and August 20, 2007. The application was declared administratively complete and accepted for filing with the Office of the Chief Clerk on August 31, 2007. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing"; and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200800717

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

Filed: February 6, 2008

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Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality (commission) on January 22, 2008, in the matter of the **Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Advantage Asphalt Products, Ltd.; SOAH Docket No. 582-08-0523; TCEQ Docket No. 2007-0768-AIR-E.** The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against Advantage Asphalt Products, Ltd. on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Paul Munguía, Office of the Chief Clerk, (512) 239-3300.

TRD-200800720

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

Filed: February 6, 2008

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Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on January 29, 2008, in the matter of the **Executive Director of the Texas Commission on Environmental Quality, Petitioner v. C.B. Express, Inc. dba Discount Beer & Cigarettes; SOAH Docket No. 582-07-2361; TCEQ Docket No. 2006-1661-PST-E.** The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against C.B. Express, Inc. dba Discount Beer & Cigarettes on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Paul Munguía, Office of the Chief Clerk, (512) 239-3300.

TRD-200800721

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

Filed: February 6, 2008

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Request for Nominations

The Texas Commission on Environmental Quality (TCEQ) is requesting nominations for two individuals to serve on the Municipal Solid Waste Management and Resource Recovery Advisory Council

(Advisory Council) for the following positions: 1) An elected official from a county with a population less than 150,000 (expires August 31, 2009); and 2) An elected official from a municipality with a population between 100,000 or more but less than 750,000 (expires August 31, 2013).

The Advisory Council was created by the 69th Legislature in 1983. Members represent various interests, which include city and county solid waste agencies, public solid waste districts or authorities, commercial solid waste landfills, planning regions, environmental perspectives, city and county governments, financial advisors, registered waste tire processors, professional engineers, solid waste professionals, composting/recycling companies and general public representatives.

Upon request from the TCEQ commissioners, the Advisory Council reviews and evaluates the effect of state policies and programs on municipal solid waste management; makes recommendations on matters relating to municipal solid waste management; recommends legislation to encourage the efficient management of municipal solid waste; recommends policies for the use, allocation, or distribution of the planning fund; and recommends special studies and projects to further the effectiveness of municipal solid waste management and recovery for the State of Texas.

The Advisory Council members are required by law to hold at least one meeting every three months. The meetings usually last one day and are held in Austin, Texas. Some travel reimbursement may be available.

To apply or to nominate an individual for one of two vacant Advisory Council positions, please complete and submit an Advisory Council application and related materials. The application and additional information is available at: *http://www.tceq.state.tx.us/goto/msw/council/.*

Evaluations will be made based upon the application, materials submitted and solid waste experience. Materials may include a resume, biography, summary of experience, list of publications, recognitions/awards, letters of reference, etc. The appointments will be made by the TCEQ's commissioners during a future Agenda meeting in Austin, Texas.

The Advisory Council application and materials must be postmarked by 5:00 p.m., Friday, March 14, 2008, to Mr. Steve Hutchinson of the Waste Permits Division. If sending by regular mail, please send to: Texas Commission on Environmental Quality, Waste Permits Division, Attention: Steve Hutchinson, P.O. Box 13087, MC 126, Austin, Texas 78711-3087. If sending by overnight mail, please send to: Texas Commission on Environmental Quality, Waste Permits Division, Attention: Steve Hutchinson, 12100 Park 35 Circle, Bldg. A, MC 126, Austin, Texas 78753. Questions regarding the Advisory Council can be directed to Mr. Hutchinson at (512) 239-6716, or e-mail address: *shutchin@tceq.state.tx.us.*

TRD-200800691
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: February 5, 2008

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Texas Facilities Commission

Request for Proposal #303-8-10672

The Texas Facilities Commission (TFC), on behalf of the Texas Department of Criminal Justice (TDCJ), announces the issuance of Request for Proposal (RFP) #303-8-10672. TFC seeks a five (5) year lease of approximately 2,394 square feet of office space in El Paso or Horizon City, El Paso County, Texas.

The deadline for questions is February 22, 2008 and the deadline for proposals is February 29, 2008 at 3:00 p.m. The anticipated award date is March 19, 2008. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of a RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at: *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=75020.*

TRD-200800725
Kay Molina
General Counsel
Texas Facilities Commission
Filed: February 6, 2008

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Texas Health and Human Services Commission

Notice of Public Hearing on Proposed Medicaid Payment Rate

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on February 29, 2008, at 1:30 p.m. to receive public comment on the proposed Medicaid payment rate for procedure code 97804 listed below. This change is part of the Medicaid medical policy changes associated with medical nutrition counseling services effective March 1, 2008. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Blvd, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code, §32.0282, and Texas Administrative Code (TAC), Title 1, §355.201(e) - (f), which require public notice and hearings on proposed Medicaid reimbursements. Persons requiring Americans with Disability Act (ADA) accommodation or auxiliary aids or services should contact Kimbra Rawlings by calling (512) 491-1174, at least 72 hours prior to the hearing so appropriate arrangements can be made.

Proposal. The proposed payment rate will be effective March 1, 2008. The proposed rate is as follows:

Type of Service*: 1

Procedure Code: 97804

Description: **

Proposed Relative Value Units (RVUs): 0.34

Medicaid Conversion Factor: $28.640

Proposed Medicaid Rate: $9.74

***Type of Service Code Key:**

1 = medical services

****Required Notice:** The five-character code included in this notice is obtained from the Current Procedural Terminology (CPT®), copyright 2008 by the American Medical Association (AMA). CPT is developed by the AMA as a listing of descriptive terms and five-character identifying codes and modifiers for reporting medical services and procedures performed by physicians. The responsibility for the content of this notice is with HHSC and no endorsement by the AMA is intended or should be implied. The AMA disclaims responsibility for any consequences or liability attributable or related to any use, nonuse or interpretation of information contained in this notice. Fee schedules,

relative value units, conversion factors, and/or related components are not assigned by the AMA, are not part of CPT, and the AMA is not recommending their use. The AMA does not directly or indirectly practice medicine or dispense medical services. The AMA assumes no liability for data contained or not contained herein. Any use of CPT outside of this notice should refer to the most recent Current Procedural Terminology, which contains the complete and most current listing of CPT codes and descriptive terms. Applicable FARS/DFARS apply. CPT is a registered trademark of the American Medical Association.

Methodology and justification. The proposed payment rate is calculated in accordance with 1 TAC §355.8085, which addresses the reimbursement methodology for physicians and certain other practitioners.

Briefing Package. A briefing package describing the proposed payment rate will be available on or after February 18, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1174; by fax at (512) 491-1998; or by e-mail at Kimbra.Rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rate may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to Kimbra.Rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

TRD-200800694
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: February 5, 2008

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Notice of Public Hearing on Proposed Medicaid Payment Rate

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on February 29, 2008, at 1:30 p.m. to receive public comment on the proposed Medicaid payment rate for the procedure code D0145 listed below. This change is part of the Medicaid medical policy changes associated with first dental home services effective March 1, 2008. The public hearing will be held in the Lone Star Conference Room of the HHSC, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and 1 Texas Administrative Code (TAC) §355.201(e) - (f), which require public notice and hearings on proposed Medicaid reimbursements. Persons requiring Americans with Disability Act (ADA) accommodation or auxiliary aids or services should contact Kimbra Rawlings by calling (512) 491-1174, at least 72 hours prior to the hearing so appropriate arrangements can be made.

Proposal. The proposed payment rate will be effective March 1, 2008. The proposed rate is as follows:

Type of Service*: W

Procedure Code: D0145

Description: Oral evaluation for a patient under three years of age and counseling with primary caregiver

Proposed Medicaid Rate: $144.97

***Type of Service Code Key:**

W = Texas Health Steps (THSteps) Dental Services

Methodology and Justification. The proposed payment rate is calculated in accordance with 1 TAC §355.8441(11), which addresses the reimbursement methodology for dental services delivered to Medicaid clients under age 21, known in Texas as Texas Health Steps (THSteps) dental services.

Briefing Package. A briefing package describing the proposed payment rate will be available on or after February 18, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1174; by fax at (512) 491-1998; or by e-mail at Kimbra.Rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rate may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to Kimbra.Rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

TRD-200800696
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: February 5, 2008

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission will conduct a public hearing on February 29, 2008, at 1:30 p.m. to receive public comment on the proposed Medicaid payment rates for the stereotactic radio surgery procedure codes listed below. These changes are associated with Medicaid medical policy changes effective March 1, 2008. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and 1 Texas Administrative Code (TAC), §355.201(e) - (f), which require public notice and hearings on proposed Medicaid reimbursements. Persons requiring Americans with Disability Act (ADA) accommodation or auxiliary aids or services should contact Kimbra Rawlings by calling (512) 491-1174, at least 72 hours prior to the hearing so appropriate arrangements can be made.

Proposal. The proposed payment rates will be effective March 1, 2008. The proposed rates are as follows:

Type of Service (TOS)*	Procedure Code	Description	Proposed Medicaid Rate
6	G0251	Linear accelerator based stereotactic radiosurgery, delivery including collimator changes and custom plugging, fractionated treatment, all lesions, per session, maximum five sessions per course of treatment	$1,080.30
2	S8030	Scleral application of tantalum ring(s) for localization of lesions for proton beam therapy	$1,249.18
F	S8030	Scleral application of tantalum ring(s) for localization of lesions for proton beam therapy	ASC Group 3
F	61795	**	ASC Group 1

***Type of Service Code Key:**
2 = surgery
6 = radiation therapy
F = ambulatory surgical center (ASC)/hospital-based ASC

*****Required Notice:** The five-character codes included in this notice are obtained from the Current Procedural Terminology (CPT®), copyright 2008 by the American Medical Association (AMA). CPT is developed by the AMA as a listing of descriptive terms and five character identifying codes and modifiers for reporting medical services and procedures performed by physicians. The responsibility for the content of this notice is with HHSC and no endorsement by the AMA is intended or should be implied. The AMA disclaims responsibility for any consequences or liability attributable or related to any use, nonuse or interpretation of information contained in this notice. Fee schedules, relative value units, conversion factors and/or related components are not assigned by the AMA, are not part of CPT, and the AMA is not recommending their use. The AMA does not directly or indirectly practice medicine or dispense medical services. The AMA assumes no liability for data contained or not contained herein. Any use of CPT outside of this notice should refer to the most recent Current Procedural Terminology, which contains the complete and most current listing of CPT codes and descriptive terms. Applicable FARS/DFARS apply. CPT is a registered trademark of the American Medical Association.*

Methodology and Justification. The proposed payment rates are calculated in accordance with 1 TAC §355.8085, which addresses the reimbursement methodology for physicians and certain other practitioners including surgical services; 1 TAC §355.8081 and 1 TAC §355.8085, which address the reimbursement methodology for radiation therapy; and 1 TAC §355.8121, which addresses the reimbursement methodology for ASCs/HASCs.

Briefing Package. A briefing package describing the proposed payment rates will be available on or after February 18, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1174; by fax at (512) 491-1998; or by e-mail at Kimbra.Rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to Kimbra.Rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

TRD-200800684
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: February 4, 2008

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission will conduct a public hearing on February 29, 2008, at 1:30 p.m. to receive public comment on the proposed Medicaid payment rate for procedure code 99078 listed below. This change is part of the Medicaid medi-

cal policy changes associated with physician services effective March 1, 2008. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Blvd, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and Texas Administrative Code (TAC) Title 1, §355.201(e) - (f), which require public notice and hearings on proposed Medicaid reimbursements. Persons requiring Americans with Disability Act (ADA) accommodation or auxiliary aids or services should contact Kimbra Rawlings by calling (512) 491-1174, at least 72 hours prior to the hearing so appropriate arrangements can be made.

Proposal. The proposed payment rate will be effective March 1, 2008. The proposed rate is as follows:

Type of Service*: 1

Procedure Code: 99078

Description: **

Proposed Medicaid Rate: $14.60

***Type of Service Code Key:** 1 = medical services

****Required Notice:** The five-character codes included in this notice are obtained from the Current Procedural Terminology (CPT®), copyright 2008 by the American Medical Association (AMA). CPT is developed by the AMA as a listing of descriptive terms and five character identifying codes and modifiers for reporting medical services and procedures performed by physicians. The responsibility for the content of this notice is with HHSC and no endorsement by the AMA is intended or should be implied. The AMA disclaims responsibility for any consequences or liability attributable or related to any use, nonuse or interpretation of information contained in this notice. Fee schedules, relative value units, conversion factors and/or related components are not assigned by the AMA, are not part of CPT, and the AMA is not recommending their use. The AMA does not directly or indirectly practice medicine or dispense medical services. The AMA assumes no liability for data contained or not contained herein. Any use of CPT outside of this notice should refer to the most recent Current Procedural Terminology, which contains the complete and most current listing of CPT codes and descriptive terms. Applicable FARS/DFARS apply. CPT is a registered trademark of the American Medical Association.

Methodology and justification. The proposed payment rate is calculated in accordance with 1 TAC §355.8085, which addresses the reimbursement methodology for physicians and certain other practitioners.

Briefing Package. A briefing package describing the proposed payment rate will be available on or after February 18, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1174; by fax at (512) 491-1998; or by e-mail at Kimbra.Rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rate may be submitted in lieu of, or in addition to, oral testimony until 5 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to Kimbra.Rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

TRD-200800693
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: February 5, 2008

Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission will conduct a public hearing on February 29, 2008, at 1:30 p.m. to receive public comment on the proposed Medicaid payment rates for the procedure codes listed below. These changes are part of the Medicaid medical policy changes associated with kidney transplant services effective March 1, 2008. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Blvd, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code, §32.0282, and Texas Administrative Code (TAC), Title 1, §355.201(e) - (f), which require public notice and hearings on proposed Medicaid reimbursements. Persons requiring Americans with Disability Act (ADA) accommodation or auxiliary aids or services should contact Kimbra Rawlings by calling (512) 491-1174, at least 72 hours prior to the hearing so appropriate arrangements can be made.

Proposal. The proposed payment rates will be effective March 1, 2008. The proposed rates are as follows:

Type of Service (TOS)*	Procedure Code	Description	Proposed Relative Value Units (RVUs)	Medicaid Conversion Factor	Proposed Medicaid Rate
2	50323	**			$402.11
8	50323	**			$64.34
2	50325	**			$402.11
8	50325	**			$64.34
2	50327	**	5.39	$28.640	$154.37
8	50327	**	0.86	$28.640	$24.63
2	50328	**	4.74	$28.640	$135.75
8	50328	**	0.76	$28.640	$21.77
2	50329	**	4.64	$28.640	$132.89
8	50329	**	0.74	$28.640	$21.19

***Type of Service Code Key:**
2 = surgery services
8 = assistant surgery services

****Required Notice:** The five-character code included in this notice is obtained from the Current Procedural Terminology (CPT®), copyright 2008 by the American Medical Association (AMA). CPT is developed by the AMA as a listing of descriptive terms and five character identifying codes and modifiers for reporting medical services and procedures performed by physicians. The responsibility for the content of this notice is with HHSC and no endorsement by the AMA is intended or should be implied. The AMA disclaims responsibility for any consequences or liability attributable or related to any use, nonuse or interpretation of information contained in this notice. Fee schedules, relative value units, conversion factors and/or related components are not assigned by the AMA, are not part of CPT, and the AMA is not recommending their use. The AMA does not directly or indirectly practice medicine or dispense medical services. The AMA assumes no liability for data contained or not contained herein. Any use of CPT outside of this notice should refer to the most recent Current Procedural Terminology, which contains the complete and most current listing of CPT codes and descriptive terms. Applicable FARS/DFARS apply. CPT is a registered trademark of the American Medical Association.*

Methodology and Justification. The proposed payment rates are calculated in accordance with 1 TAC §355.8085, which addresses the reimbursement methodology for physicians and certain other practitioners, including surgery and assistant surgery services.

Briefing Package. A briefing package describing the proposed payment rates will be available on or after February 18, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1174; by fax at (512) 491-1998; or by e-mail at Kimbra.Rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to Kimbra.Rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

TRD-200800695
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: February 5, 2008

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Department of State Health Services

Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Throughout TX	J-W Wireline	L06132	Addison	00	01/25/08
Throughout TX	Castle Engineering & Testing LLC	L06143	Laredo	00	01/31/08
Throughout TX	Applied Physics and Measurements, Inc.	L06120	Missouri City	00	01/17/08
Tomball	Tomball Imaging LLP	L06137	Tomball	00	01/22/08

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Allen	Presbyterian Hospital of Allen	L05765	Allen	11	01/17/08
Alvin	Ineos USA LLC	L01422	Alvin	68	01/17/08
Amarillo	City of Amarillo Water Department	L02222	Amarillo	10	01/24/08
Austin	Austin Positron Emission Tomography LP DBA Austin PET & Imaging Center	L05861	Austin	05	01/25/08
Austin	Austin Radiological Association	L00545	Austin	137	01/14/07
Bay City	Bay City Cardiology Clinic	L05975	Bay City	02	01/28/08
Beaumont	ExxonMobil Oil Corporation	L02316	Beaumont	37	01/31/08
Beaumont	ExxonMobil Oil Corporation	L00603	Beaumont	83	01/29/08
Beaumont	Advanced Cardiovascular Specialists LLP	L05512	Beaumont	13	01/16/08
Beaumont	Wayne S. Margolis MD PA	L06049	Beaumont	01	01/15/08
Carrollton	Medical Edge Healthcare Group PA DBA Heart First	L05555	Carrollton	19	01/16/08
Columbus	Columbus Community Hospital	L03508	Columbus	18	01/23/08
Conroe	CHCA Conroe LP DBA Conroe Regional Medical Center	L01769	Conroe	76	01/22/08
Conroe	Sadler Clinic/Montgomery County Management Co	L04899	Conroe	25	01/17/08
Corinth	Network Cancer Care of Denton DBA Cancer Care Resource	L05348	Corinth	21	01/16/07
Corpus Christi	McTurbine Inc	L04341	Corpus Christi	08	01/29/08
Corpus Christi	Valero Refining - Texas LP	L03360	Corpus Christi	25	01/17/08
Corpus Christi	Jordan Laboratories Inc	L02455	Corpus Christi	18	01/18/08
Dallas	Renaissance Hospital Dallas Inc	L05900	Dallas	07	01/29/08
Dallas	Baylor University Medical Center	L01290	Dallas	87	01/23/08
Denton	Mayhill Cancer Center LLC DBA Denton Regional Radiation Oncology	L06093	Denton	02	01/17/08
Denton	Daniel W Caldwell MD PA	L05984	Denton	04	01/23/08
El Paso	Desert Imaging	L05626	El Paso	07	01/28/08
El Paso	Southwest Endocrine Consultants	L05617	El Paso	09	01/29/08
Fort Worth	Maxum Health Services Corporation DBA Insight Diagnostic Center	L05887	Fort Worth	05	01/29/08
Fort Worth	Weatherford International Inc	L00747	Fort Worth	80	01/29/08
Fort Worth	Harris Methodist Fort Worth	L01837	Fort Worth	111	01/22/08
Gatesville	Coryell County Memorial Hospital Authority DBA Coryell Memorial Hospital	L02391	Gatesville	31	01/24/08
Greenville	Hunt Memorial Hospital District DBA Presbyterian Hospital of Greenville	L01695	Greenville	34	01/29/08
Houston	Proportional Technologies Inc	L04747	Houston	22	01/30/08
Houston	Memorial Hermann Hospital System DBA Memorial Hospital Southwest	L00439	Houston	132	01/29/08
Houston	Houston Cardiovascular Associates	L05070	Houston	14	01/29/08

AMENDMENTS TO EXISTING LICENSES ISSUED CONTINUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	Woodlands-North Houston Cardiovascular Imaging Center	L04253	Houston	20	01/29/08
Houston	Gulf Coast Cancer and Diagnostic Center at Southeast Inc DBA Gulf Coast Cancer Center at Southeast	L05194	Houston	11	01/29/08
Houston	SJ Medical Center LLC DBA St Joseph Medical Center	L02279	Houston	65	01/28/08
Houston	New Medical Horizons II LTD DBA Cypress Fairbanks Medical Center	L03424	Houston	31	01/23/08
Houston	CHCA West Houston LP DBA West Houston Medical Center	L06055	Houston	02	01/15/07
Houston	American Diagnostic Tech LLC	L05514	Houston	45	01/24/08
Houston	ExxonMobil Upstream Research Company	L00205	Houston	58	01/18/08
Houston	Hillcroft Medical Clinic Association	L05618	Houston	05	01/14/08
Houston	Mallinckrodt Medical Inc	L03008	Houston	77	01/05/08
Houston	Mandes Inspection & Testing Services Inc	L05220	Houston	59	01/17/08
Houston	Memorial Hermann Healthcare System DBA Hermann Hospital	L04655	Houston	31	01/15/08
Houston	Memorial Hermann Hospital System DBA Memorial Hospital Southwest	L00439	Houston	131	01/16/08
Houston	Memorial Hermann Hospital System DBA Memorial Hospital Memorial City	L01168	Houston	97	01/16/08
Houston	Memorial Hermann Hospital System DBA Memorial Hospital Memorial City	L01168	Houston	98	01/22/08
Houston	Memorial Hermann Hospital System Inc DBA Memorial Hermann Hospital	L00650	Houston	83	01/14/08
Houston	Memorial Hermann Hospital System Inc DBA Memorial Hermann Hospital	L00650	Houston	84	01/16/08
Houston	Methodist Health Centers DBA Methodist Willowbrook Hospital	L05472	Houston	26	01/15/08
Houston	Mohammed Attar MD/Nadim Zacca MD DBA Nuclear LAB	L05615	Houston	04	01/22/08
Houston	Proportional Technologies Inc	L04747	Houston	21	01/18/08
Houston	River Oaks Imaging and Diagnostic LP DBA River Oaks Imaging and Diagnostic	L05493	Houston	12	01/14/08
Houston	Saint-Gobain Ceramics and Plastics	L04895	Houston	10	11/24/08
Houston	The University of Texas Health Science Center at Houston	L02774	Houston	53	01/15/08
Houston	University of Texas MD Anderson Cancer Center	L00466	Houston	109	01/14/08
Humble	Madaiah Revana MD PA DBA Humble Cardiology Associates & Pacemaker Clinic	L03263	Humble	09	01/15/08
Irving	Dallas-Ft Worth Veterinary Imaging Center DBA Animal Imaging	L04602	Irving	09	01/25/08
Kerrville	SID Peterson Memorial Hospital	L01722	Kerrville	36	01/22/08
Kingwood	Houston Physicians Medical Association PLLC DBA H P PET/CT Center	L05901	Kingwood	03	01/23/07
Lubbock	Texas Tech University Health Sciences Center	L01869	Lubbock	84	01/18/08
Lubbock	Covenant Health System DBA Joe Arrington Cancer Research & Treatment Ctr	L06028	Lubbock	07	01/25/08
Lubbock	University Medical Center	L04719	Lubbock	95	01/29/08
Lufkin	Heart and Vascular Diagnostic Clinic	L05850	Lufkin	03	01/29/08
Lufkin	Memorial Medical Center of East Texas	L01346	Lufkin	78	01/22/08
Marble Falls LP	Marble Falls Imaging Center LP DBA Marble Falls Imaging Center	L05301	Marble Falls	10	01/23/08
Mont Belvieu	ExxonMobil Chemical	L03119	Mont Belvieu	27	01/18/08

AMENDMENTS TO EXISTING LICENSES ISSUED CONTINUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Nacogdoches	Nacogdoches Medical Center	L02853	Nacogdoches	39	01/24/08
Pasadena	Conam Inspection & Engineering Inc	L05010	Pasadena	137	01/16/08
Pasadena	Fairmont Diagnostic Center and Open MRI Inc DBA Fairmont Diagnostic Center	L05712	Pasadena	07	01/16/08
Pasadena	University Cancer Center Huntsville Brenham Inc	L06070	Pasadena	02	01/17/08
Plano	Columbia Medical Center of Plano Subsidiary LP DBA Medical Center of Plano	L02032	Plano	86	01/22/08
Rowlett	Lake Pointe Operating Company LLC DBA Lake Pointe Medical Center	L04060	Rowlett	14	01/25/08
San Angelo	Shannon Clinic	L04216	San Angelo	41	01/15/08
San Antonio	Trinity University	L01668	San Antonio	42	01/28/08
San Antonio	The University of Texas Health Science Center at San Antonio	L01279	San Antonio	112	01/25/08
San Antonio	Accord Medical Management LP DBA Nix Health Care System	L03531	San Antonio	27	01/29/08
San Antonio	Bionumerik Pharmaceuticals Inc	L05226	San Antonio	11	01/22/08
San Antonio	Cardiology of San Antonio PA	L05408	San Antonio	03	01/15/08
San Antonio	Methodist Healthcare System of San Antonio DBA Methodist Hospital	L00594	San Antonio	238	01/16/08
San Antonio	Northeast Baptist Surgery Center	L06119	San Antonio	01	01/15/08
San Antonio	The University of Texas Health Science Center at San Antonio	L05217	San Antonio	10	01/14/08
Sugar Land	Methodist Sugar Land Hospital	L05788	Sugar Land	13	01/16/08
Texarkana	Wadley Regional Medical Center	L02486	Texarkana	50	01/29/08
Texas City	Valero Refining Company	L02578	Texas City	33	01/29/08
Texas City	International Industrial Fab Inc	L04935	Texas City	23	01/17/08
The Woodlands	St Lukes Community Medical Center The Woodlands	L05763	The Woodlands	09	01/25/08
The Woodlands	Advanced Cardiovascular Care Center PA	L05413	The Woodlands	05	01/17/08
Throughout TX	Team Industrial Services Inc	L00087	Alvin	178	01/17/08
Throughout Tx	KXT Inspection Inc	L01074	Barker	105	01/25/08
Throughout TX	Gulf Coast Weld Spec	L05426	Beaumont	64	01/30/08
Throughout Tx	Applied Standards Inspection Inc	L03072	Beaumont	99	01/18/08
Throughout Tx	Price Construction LTD	L05205	Big Spring	03	01/23/08
Throughout TX	Construction Services	L05625	Christoval	07	01/17/08
Throughout TX	Terracon Consultants Inc	L05268	Dallas	24	01/18/08
Throughout TX	IRISNDT Inc	L04769	Deer Park	47	01/31/08
Throughout TX	Numed Diagnostic Imaging	L02129	Denton	60	01/16/08
Throughout TX	Professional Services Industries Inc	L02476	El Paso	22	01/30/08
Throughout TX	H & H-Ray Services Inc	L02516	Flint	67	01/15/07
Throughout TX	Precision Energy Services Inc	L04286	Fort Worth	72	01/25/08
Throughout TX	Litton Electro-Optical Systems	L02155	Garland	32	01/30/08
Throughout TX	Kohutek Engineering & Testing Inc	L05967	Georgetown	01	01/18/08
Throughout TX	Atser Corporation	L04741	Houston	29	01/23/08
Throughout TX	METCO	L03018	Houston	180	01/29/08
Throughout TX	Woof Group Logging Services Inc	L05262	Houston	25	01/10/08
Throughout TX	Halliburton Energy Services Inc	L02113	Houston	109	01/24/08
Throughout TX	Alpha-Neutronics Inc	L05784	Houston	05	01/29/08
Throughout TX	Sam Engineering & Testing LP	L04930	Irving	08	01/24/08
Throughout TX	Acuren Inspection Inc	L01774	La Porte	240	01/23/08
Throughout TX	Non-Destructive Inspection Corporation	L02712	Lake Jackson	136	01/24/08
Throughout TX	Master Industries Inc	L05872	Liberty	13	01/28/08
Throughout TX	Eagle X-ray	L03246	Mont Belvieu	95	01/25/08
Throughout TX	Anatec Texas Inc	L04865	Nederland	74	01/17/08
Throughout TX	Anatec Texas Inc	L04865	Nederland	75	01/28/08
Throughout TX	TechCorr USA LLC	L05972	Pasadena	42	01/29/08

AMENDMENTS TO EXISTING LICENSES ISSUED CONTINUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Throughout TX	Texas Gamma Ray LLC	L05561	Pasadena	79	01/16/08
Throughout TX	Quantum Technical Services Inc	L03731	Pasadena	30	01/16/08
Throughout TX	Fugro Consultants LP	L04322	Pasadena	90	01/23/08
Throughout TX	Fugro Consultants LP	L04322	Pasadena	89	01/17/08
Throughout TX	Techcorr USA LLC	L05972	Pasadena	41	01/24/08
Throughout TX	Century Inspection Inc	L00062	Ponder	105	01/15/08
Throughout TX	Raba-Kistner Consultants Inc Ada Raba-Kistner-Brytest Consultants Inc	L01571	San Antonio	60	01/17/08
Throughout TX	BJ Services Company USA	L02684	Tomball	57	01/24/08
Throughout TX	Apex Geoscience Inc	L04929	Tyler	30	01/23/08
Tyler	Cardiovascular Associates of East Texas PA	L04800	Tyler	20	01/25/08
Tyler	East Texas Medical Center Healthcare Associates DBA First Physicians	L05702	Tyler	12	01/14/08
Tyler	Trinity Mother Frances Health System	L01670	Tyler	132	01/18/08
Waxahachie	Baylor Medical Center at Waxahachie	L04536	Waxahachie	31	01/22/08
Webster	River Oaks Imaging and Diagnostic LP DBA River Oaks Imaging and Diagnostic	L05475	Webster	11	01/14/08

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Borger	Agrium US Inc Borger Nitrogen Operations	L02772	Borger	19	01/17/08
Corpus Christi	Flint Hills Resources LP	L00322	Corpus Christi	44	01/25/08
Hallsville	Southwestern Electric Power Company	L03297	Hallsville	20	01/17/08
Pasadena	Ethyl Corporation	L05094	Pasadena	07	01/10/08

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Pampa	American Diagnostic Medical Corp	L06033	Pampa	03	01/25/08
San Antonio	Cancer Therapy & Research Ctr Research Foundation DBA Institute for Drug Development	L03350	San Antonio	39	01/25/08
Throughout TX	City of Garland Neighborhood Development	L05458	Garland	05	01/18/08

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of Title 25 Texas Administrative Code (TAC) Chapter 289 regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3189. For information call (512) 834-6688.

TRD-200800667

Lisa Hernandez
General Counsel
Department of State Health Services
Filed: February 4, 2008

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Notice of Certification of Non-profit Hospitals or Hospital Systems for Limited Liability

The Hospital Survey Unit in the Center for Health Statistics, Department of State Health Services (department), has completed its analysis of hospital data for the purpose of certifying nonprofit hospitals or hospital systems for limited liability in accordance with the Health and Safety Code, §311.0456. We received requests for certification from 13 hospitals. We will notify each hospital by mail that is certified in accordance with §311.0456. Therefore, if you have any comments or questions about the following certification results, please contact Mr. Dwayne Collins or Ms. JaNell Jenkins of the department's Center for Health Statistics.

Certified. 4 non-profit hospitals were determined to be eligible for certification based on information that they provided 8 percent or more of their net patient revenue as charity care and provided 40 percent or more of the charity care in their counties:

1. CHRISTUS Spohn Hospital Beeville in Bee County;

2. CHRISTUS Spohn Hospital Alice in Jim Wells County;

3. CHRISTUS Spohn Hospital Kleberg in Kleberg County;

4. Daughters of Charity Health Services--Brackenridge Hospital in Travis County.

Not Certified. 9 non-profit hospitals were not certified because, based on their survey data, they did not provide 8 percent of their net patient revenue as charity care or did not provide 40 percent of the charity care in their counties:

1. CHRISTUS Santa Rosa Hospital in Bexar County;

2. CHRISTUS Santa Rosa Children's Hospital in Bexar County;

3. CHRISTUS St. Michael Health System in Bowie County;

4. CHRISTUS St. Michael Rehabilitation Hospital in Bowie County;

5. CHRISTUS St. John Hospital in Harris County;

6. CHRISTUS Jasper Memorial Hospital in Jasper County;

7. CHRISTUS Hospital in Jefferson County;

8. CHRISTUS Spohn Hospital Corpus Christi in Nueces County;

9. Shannon West Texas Memorial Hospital, in Tom Green County

For further information about this report, please contact Mr. Dwayne Collins or Ms. JaNell Jenkins in the Center for Health Statistics, Department of State Health Services, 1100 West 49th Street, Austin, Texas, telephone (512) 458-7261.

TRD-200800666
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: February 4, 2008

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Texas Department of Housing and Community Affairs

Notice of Public Hearing: Single Family Mortgage Revenue Refunding Bonds

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Department") at 221 East 11th Street, Room 116, Austin, Texas, at 12:00 noon on March 17, 2008, with respect to a plan of financing (the "Plan") that includes issues of tax-exempt single family mortgage revenue refunding bonds (the "Bonds"), the first of which is to be issued within one year of the date of the hearing described below and the last of which is to be issued no later than three years from the first delivery of Bonds under the Plan.

The Bonds will be issued by the Department in one or more series or subseries, in a maximum aggregate face amount not to exceed $200,000,000. The proceeds of the Bonds will be used for the following purposes: (a) to refund certain single family mortgage revenue bonds of the Department and thereby to recycle prepayments and repayments of loans made with the proceeds of such bonds in order to provide single family residential mortgage loans; (b) to refund certain single family mortgage revenue bonds of the Department and thereby to recycle unexpended proceeds of such bonds in order to provide single family residential mortgage loans; and (c) to provide single family residential mortgage loans. For purposes of subsection (a) above, only prepayments and repayments of mortgage loans financed with proceeds of tax-exempt single family mortgage revenue bonds issued within ten years from the date of receipt of the prepayments or repayments will be eligible for the recycling program.

It is the Department's intent that the Bonds will be refunded with the proceeds of various issues of single family mortgage revenue bonds to be issued by the Department under the Plan, thereby making funds available to make single family residential mortgage loans. All of such single family residential mortgage loans will be made to eligible very low, low, and moderate income homebuyers for the purchase of homes located within the State of Texas.

For purposes of the Department's mortgage loan finance programs, eligible borrowers generally will include individuals and families whose family income does not exceed: (i) for families of three or more persons, 115% (140% in certain targeted areas) of the area median income and (ii) for individuals and families of two persons, 100% (120% in certain targeted areas) of the area median income, who have not owned a principal residence during the preceding three years (except in certain cases permitted under applicable provisions of the Internal Revenue Code). Further, residences financed with loans under the programs generally will be subject to certain other limitations, including limits on the purchase prices of the residences being acquired. All the limitations described in this paragraph are subject to revision and adjustment from time to time by the Department pursuant to changes in applicable federal law and Department policy.

All interested parties are invited to attend such public hearing to express their views with respect to the Department's mortgage loan finance program and the issuance of the Bonds. Questions or requests for additional information may be directed to Heather Hodnett at the Texas Department of Housing and Community Affairs, 221 East 11th Street, Austin, Texas 78701; telephone (512) 475-1899.

Persons who intend to appear at the hearing and express their views are invited to contact Heather Hodnett in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Heather Hodnett prior to the date scheduled for the hearing.

TDHCA WEBSITE: www.tdhca.state.tx.us/hf.htm

Individuals who require auxiliary aids for the hearing should contact Gina Esteves, ADA Responsible Employee, at (512) 475-3943, or Re-

lay Texas at 1-800-735-2989 at least two days before the hearing so that appropriate arrangements can be made.

Non-English speaking individuals who require interpreters for the hearing should contact Heather Hodnett at (512) 475-1899 at least three days before the hearing so that appropriate arrangements can be made. Personas que hablan español y requieren un intérprete, favor de llamar a Jorge Reyes al siguiente número (512) 475-4577 por lo menos tres días antes de la junta para hacer los preparativos apropiados.

This notice is published, and the above-described hearing is to be held in satisfaction of the requirements of State law and §147(f) of the Internal Revenue Code of 1986, as amended, regarding the public approval prerequisite to the exclusion from gross income for federal income tax purposes of interest on the Bonds.

TRD-200800714
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: February 5, 2008

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Houston-Galveston Area Council

Request for Proposals

The Houston-Galveston Area Council (H-GAC) solicits proposals from qualified organizations interested in managing training activities, developing customized curricula and providing staff development consulting services for the Gulf Coast public workforce system.

The system is composed of the Gulf Coast Workforce Board and its staff, and an operating affiliate that includes six contractors providing direct service for businesses and residents through two divisions. Last year, this operating unit--currently known as The WorkSource--spent about $200 million and served more than 21,000 businesses and 400,000 residents in a 13-county area that includes Houston, Harris County, and the twelve surrounding counties.

Prospective bidders may obtain a copy of the Request for Proposals online at http://www.theworksource.org or by contacting Carol Kimmick at (713) 627-3200 or by sending email to carol.kimmick@h-gac.com. Responses are due at H-GAC offices by 12:00 noon on Thursday, February 28, 2008. Late proposals will not be accepted. There will be no exceptions.

TRD-200800654
Jack Steele
Executive Director
Houston-Galveston Area Council
Filed: February 1, 2008

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Texas Department of Insurance

Company Licensing

Application to change the name of CONVERIUM REINSURANCE (NORTH AMERICA) INC. to FINIAL REINSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Stamford, Connecticut.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200800726
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: February 6, 2008

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application of CREATIVE RISK SOLUTIONS, INC., a foreign third party administrator. The home office is WEST DES MOINES, IOWA.

Application of AMERICAN MANAGED CARE, LLC., a foreign third party administrator. The home office is ST. PETERSBURG, FLORIDA.

Application of TOKIO MARINE MANAGEMENT, INC., a foreign third party administrator. The home office is NEW YORK, NEW YORK.

Application to change the name of ADVANCEPCS HEALTH, L.P. to CAREMARKPCS HEALTH, L.P., a foreign third party administrator. The home office is WILMINGTON, DELAWARE.

Application to change the name of DORAL THERAPY SERVICES, LLC to AMERICAN THERAPY ADMINISTRATORS, LLC, a foreign third party administrator. The home office is MEQUON, WISCONSIN.

Any objections must be filed within 20 days after this notice is published in the *Texas Register*, addressed to the attention of Matt Ray, MC 107-1A, 333 Guadalupe, Austin, Texas 78701.

TRD-200800549
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: January 31, 2008

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Texas Lottery Commission

Instant Game Number 1024 "Super Set for Life"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1024 is "SUPER SET FOR LIFE". The play style is "key number match with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1024 shall be $20.00 per ticket.

1.2 Definitions in Instant Game No. 1024.

A. Display Printing--That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint--The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol--The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, DOLLAR BILL SYMBOL, STAR SYMBOL, LIFE SYMBOL, $20.00, $25.00,

$30.00, $40.00, $100, $500, $1,000, $2,000, $10,000 or $500K/YR SYMBOL.

D. Play Symbol Caption- the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1024 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
DOLLAR BILL SYMBOL	AUTO
STAR SYMBOL	WINALL
LIFE SYMBOL	WIN
$20.00	TWENTY
$25.00	TWY FIV
$30.00	THIRTY

$40.00	FORTY
$100	ONE HUND
$500	FIV HUND
$1,000	ONE THOU
$2,000	TWO THOU
$10,000	10 THOU
$500K/YR	500K/YR

E. Retailer Validation Code--Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 1024 - 1.2E

CODE	PRIZE
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number--A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

G. Low-Tier Prize--A prize of $20.00.

H. Mid-Tier Prize--A prize of $25.00, $30.00, $40.00, $100 or $500.

I. High-Tier Prize--A prize of $1,000, $2,000, $10,000 or $500K/YR (for 15 years not to exceed $7,500,000).

J. Bar Code--A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number--A 14 (fourteen) digit number consisting of the four (4) digit game number (1024), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 025 within each pack. The format will be: 1024-0000001-001.

L. Pack--A pack of "SUPER SET FOR LIFE" Instant Game tickets contains 25 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 025 while the other fold will show the back of ticket 001 and front of 025.

M. Non-Winning Ticket--A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket--A Texas Lottery "SUPER SET FOR LIFE" Instant Game No. 1024 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery § 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "SUPER SET FOR LIFE" Instant Game is determined once the latex on the ticket is scratched off to expose 55 (fifty-five) play symbols. If the player matches any of YOUR NUMBERS to any of the WINNING NUMBERS, the player wins the PRIZE shown for that number. If the player reveals a DOLLAR BILL SYMBOL, the player wins the PRIZE shown instantly. If the player reveals a STAR SYMBOL, the player wins all 25 PRIZES shown. If the player reveals a LIFE SYMBOL, the player wins $500,000 a year for 15 years not to exceed $7,500,000 total. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 55 (fifty-five) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 55 (fifty-five) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 55 (fifty-five) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 55 (fifty-five) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No five or more like non-winning prize symbols on a ticket.

C. No duplicate WINNING NUMBERS play symbols on a ticket.

D. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

E. The STAR (win all) play symbol will only appear on intended winning tickets as dictated by the prize structure.

F. The LIFE (annuity prize) play symbol will only appear with the $500K/YR prize symbol and both symbols will only appear on the four winning tickets as dictated by the prize structure.

G. Non-winning prize symbols will never be the same as the winning prize symbol(s).

H. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 20 and $20).

2.3 Procedure for Claiming Prizes.

A. To claim a "SUPER SET FOR LIFE" Instant Game prize of $20.00, $25.00, $30.00, $40.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $25.00, $30.00, $40.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "SUPER SET FOR LIFE" Instant Game prize of $1,000, $2,000 or $10,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. To claim a "SUPER SET FOR LIFE" top level prize of $500,000 per year (for 15 years not to exceed $7,500,000 total), the claimant must sign the winning ticket and present it at Texas Lottery Commission headquarters in Austin, Texas. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. When claiming a "SUPER SET FOR LIFE" Instant Game prize of $500,000 per year (for 15 years not to exceed $7,500,000), the claimant will receive his prize:

1. Annually via direct deposit to the winner's account. With this plan, upon validation of the prize, a payment of $500,000 less any taxes and/or other offsets or mandatory withholdings required by law, will be made once a year on the first business day of the anniversary month of the claim. Annual payments will be made for a period of 15 years

or a total of 15 annual payments to reach the total maximum payment of $7,500,000.

2. If a payment falls on a holiday or weekend, the payment will be made on the following business day

E. As an alternative method of claiming a "SUPER SET FOR LIFE" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

F. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

G. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "SUPER SET FOR LIFE" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "SUPER SET FOR LIFE" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 7,200,000 tickets in the Instant Game No. 1024. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 1024 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$20	432,000	16.67
$25	792,000	9.09
$30	720,000	10.00
$40	288,000	25.00
$100	93,000	77.42
$500	8,700	827.59
$1,000	3,360	2,142.86
$2,000	600	12,000.00
$10,000	30	240,000.00
$500K/YR	4	1,800,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 3.08. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1024 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1024, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200800545
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: January 30, 2008

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Instant Game Number 1048 "Money Maker"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1048 is "MONEY MAKER". The play style is "key number match with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1048 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 1048.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 10X, $5.00, $10.00, $15.00, $20.00, $25.00, $40.00, $50.00, $100, $500, $1,000, and $50,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1048 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
10X	WINX10
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$20.00	TWENTY
$25.00	TWY FIV
$40.00	FORTY
$50.00	FIFTY

$100	ONE HUND
$500	FIV HUND
$1,000	ONE THOU
$50,000	50 THOU

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 1048 - 1.2E

CODE	PRIZE
FIV	$5.00
TEN	$10.00
FTN	$15.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

G. Low-Tier Prize - A prize of $5.00, $10.00, $15.00 or $20.00.

H. Mid-Tier Prize - A prize of $50.00, $100 or $500.

I. High-Tier Prize - A prize of $1,000, $5,000 or $50,000.

J. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1048), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 1048-0000001-001.

L. Pack - A pack of "MONEY MAKER" Instant Game tickets contains 075 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of 001 and front 075.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "MONEY MAKER" Instant Game No. 1048 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "MONEY MAKER" Instant Game is determined once the latex on the ticket is scratched off to expose 45 (forty-five) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to any of the WINNING NUMBERS play symbols, the player wins PRIZE shown for that number. If a player reveals a "10X" play symbol, the player wins 10 (ten) TIMES the PRIZE shown. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 45 (forty-five) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 45 (forty-five) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 45 (forty-five) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 45 (forty-five) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. The "10X" play symbol (10 times multiplier) will only appear once on intended winning tickets and only as dictated by the prize structure.

C. No more than three (3) identical non-winning prize symbols will appear on a ticket.

D. No duplicate WINNING NUMBERS play symbols on a ticket.

E. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

F. Non-winning prize symbols will never be the same as the winning prize symbol(s).

G. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 5 and $5).

H. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "MONEY MAKER" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $50.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "MONEY MAKER" Instant Game prize of $1,000, $5,000 or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "MONEY MAKER" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "MONEY MAKER" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "MONEY MAKER" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 1048. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 1048 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	720,000	8.33
$10	600,000	10.00
$15	160,000	37.50
$20	120,000	50.00
$50	80,000	75.00
$100	10,050	597.01
$500	735	8,163.27
$1,000	150	40,000.00
$5,000	15	400,000.00
$50,000	8	750,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.55. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1048 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1048, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200800579
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: February 1, 2008

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Instant Game Number 1055 "Loteria Texas"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1055 is "LOTERIA TEXAS". The play style is "coordinate with prize legend".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1055 shall be $3.00 per ticket.

1.2 Definitions in Instant Game No. 1055.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: THE ARROWS SYMBOL, THE BELL SYMBOL, THE BOOT SYMBOL, THE CACTUS SYMBOL, THE CANOE SYMBOL, THE CROWN SYMBOL, THE DEER SYMBOL, THE DRUM SYMBOL, THE FISH SYMBOL, THE FLOWERPOT SYMBOL, THE FROG SYMBOL, THE HAND SYMBOL, THE LADDER SYMBOL, THE MERMAID SYMBOL, THE MOON SYMBOL, THE MUSICIAN SYMBOL, THE PARROT SYMBOL, THE PEAR SYMBOL, THE PITCHER SYMBOL, THE ROOSTER SYMBOL, THE ROSE SYMBOL, THE STAR SYMBOL, THE SUN SYMBOL, THE TREE SYMBOL, THE UMBRELLA SYMBOL, THE VIOLIN SYMBOL, THE WATERMELON SYMBOL, THE WORLD SYMBOL and THE BARREL SYMBOL.

D. Play Symbol Caption - the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1055 - 1.2D

PLAY SYMBOL	CAPTION
THE ARROWS SYMBOL	THE ARROWS
THE BELL SYMBOL	THE BELL
THE BOOT SYMBOL	THE BOOT
THE CACTUS SYMBOL	THE CACTUS
THE CANOE SYMBOL	THE CANOE
THE CROWN SYMBOL	THE CROWN
THE DEER SYMBOL	THE DEER
THE DRUM SYMBOL	THE DRUM
THE FISH SYMBOL	THE FISH
THE FLOWERPOT SYMBOL	THE FLOWERPOT
THE FROG SYMBOL	THE FROG
THE HAND SYMBOL	THE HAND
THE LADDER SYMBOL	THE LADDER
THE MERMAID SYMBOL	THE MERMAID
THE MOON SYMBOL	THE MOON
THE MUSICIAN SYMBOL	THE MUSICIAN
THE PARROT SYMBOL	THE PARROT
THE PEAR SYMBOL	THE PEAR
THE PITCHER SYMBOL	THE PITCHER
THE ROOSTER SYMBOL	THE ROOSTER
THE ROSE SYMBOL	THE ROSE
THE STAR SYMBOL	THE STAR
THE SUN SYMBOL	THE SUN
THE TREE SYMBOL	THE TREE
THE UMBRELLA SYMBOL	THE UMBRELLA
THE VIOLIN SYMBOL	THE VIOLIN
THE WATERMELON SYMBOL	THE WATERMELON
THE WORLD SYMBOL	THE WORLD
THE BARREL SYMBOL	THE BARREL

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 1055 - 1.2E

CODE	PRIZE
THR	$3.00
FOR	$4.00
SVN	$7.00
TEN	$10.00
SVT	$17.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

G. Low-Tier Prize - A prize of $3.00, $4.00, $7.00, $10.00, $17.00 or $20.00.

H. Mid-Tier Prize - A prize of $30.00, $33.00, $50.00, $80.00 or $300.

I. High-Tier Prize - A prize of $3,000 or $33,000.

J. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1055), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 1055-0000001-001.

L. Pack - A pack of "LOTERIA TEXAS" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). There will be 2 fanfold configurations for this game. Configuration A will show the front of ticket 001 and the back of ticket 125. Configuration B will show the back of ticket 001 and the front of ticket 125.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "LOTERIA TEXAS" Instant Game No. 1055 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "LOTERIA TEXAS" Instant Game is determined once the latex on the ticket is scratched off to expose 30 (thirty) play symbols. The player scratches off the Caller's Card area to reveal 14 symbols. The player scratches only the symbols on the LOTERIA Card that match the symbols revealed on the Caller's Card to reveal a bean. The player reveals 4 beans in any complete horizontal or vertical line on the LOTERIA Card to win the prize shown for that line. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 30 (thirty) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 30 (thirty) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 30 (thirty) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 30 (thirty) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. A ticket may win up to three (3) times per the prize structure.

C. No adjacent tickets will contain identical CALLER'S CARD play symbols in exactly the same locations.

D. No duplicate play symbols in the CALLER'S CARD play area.

E. On non-winning tickets, there will be at least one near win. A near win is defined as matching 3 of the 4 symbols to the CALLER'S CARD for a given row or column.

F. There will be no occurrence of all 4 symbols in either diagonal matching the CALLER'S CARD symbols.

G. At least 8, but no more than 12, CALLER'S CARD play symbols will match a symbol on the LOTERIA Card on a ticket.

H. No duplicate play symbols on a LOTERIA Card as indicated in the artwork section.

I. Each LOTERIA Card will have an occurrence of the rooster symbol as indicated in the artwork section.

2.3 Procedure for Claiming Prizes.

A. To claim a "LOTERIA TEXAS" Instant Game prize of $3.00, $4.00, $7.00, $10.00, $17.00, $20.00, $30.00, $33.00, $50.00, $80.00, or $300, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $30.00, $33.00, $50.00, $80.00, or $300 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "LOTERIA TEXAS" Instant Game prize of $3,000 or $33,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "LOTERIA TEXAS" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "LOTERIA TEXAS" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "LOTERIA TEXAS" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 5,040,000 tickets in the Instant Game No. 1055. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 1055 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$3	725,760	6.94
$4	161,280	31.25
$7	141,120	35.71
$10	90,720	55.56
$17	80,640	62.50
$20	80,640	62.50
$30	7,644	659.34
$33	5,250	960.00
$50	4,284	1,176.47
$80	4,200	1,200.00
$300	2,100	2,400.00
$3,000	46	109,565.22
$33,000	10	504,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.87. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1055 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1055, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200800580
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: February 1, 2008

♦ ♦ ♦

Instant Game Number 1056 "Texas MLB"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1056 is "TEXAS MLB". The play style is "key number match with auto win.

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1056 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 1056.

A. Display Printing--That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint--The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol--The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, BASEBALL SYMBOL, HOME RUN SYMBOL, $5.00, $10.00, $15.00, $20.00, $50.00, $100, $1,000 and $50,000.

D. Play Symbol Caption--The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1056 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
BASEBALL SYMBOL	AUTO
HOME RUN SYMBOL	WINALL
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$20.00	TWENTY
$50.00	FIFTY

$100	ONE HUND
$1,000	ONE THOU
$50,000	50 THOU

E. Retailer Validation Code--Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 1056 - 1.2E

CODE	PRIZE
FIV	$5.00
TEN	$10.00
FTN	$15.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number--A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

G. Low-Tier Prize--A prize of $5.00, $10.00, $15.00 or $20.00.

H. Mid-Tier Prize--A prize of $50.00 or $100.

I. High-Tier Prize--A prize of $1,000, $5,000 or $50,000.

J. Bar Code--A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number--A 14 (fourteen) digit number consisting of the four (4) digit game number (1056), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 75 within each pack. The format will be: 1056-0000001-001.

L. Pack--A pack of "TEXAS MLB" Instant Game tickets contains 75 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of ticket 001 and front of 075.

M. Non-Winning Ticket--A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket--A Texas Lottery "TEXAS MLB" Instant Game No. 1056 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in "TEXAS MLB" Instant Game is determined once the latex on the ticket is scratched off to expose 45 (forty-five) play symbols. If a player matches any of YOUR NUMBERS play symbols to any of the WINNING NUMBERS play symbols, the player wins the prize shown for that number. If a player reveals a "baseball" play symbol, the player wins the prize shown instantly. If a player reveals a "home run" play symbol, the player wins all twenty prizes instantly! No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 45 (forty-five) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 45 (forty-five) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 45 (forty-five) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 45 (forty-five) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No six or more like non-winning prize symbols on a ticket.

C. No duplicate WINNING NUMBERS play symbols on a ticket.

D. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

E. The HR (win all) play symbol will only appear on intended winning tickets as dictated by the prize structure.

F. Non-winning prize symbols will never be the same as a winning prize symbol(s).

G. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 5 and $5).

H. The $1,000 and $50,000 prize symbols will appear at least once on every ticket unless otherwise restricted by the prize structure.

I. When the HR (win all) play symbol appears, there will be no occurrence of a YOUR NUMBER play symbol matching a WINNING NUMBER play symbol.

2.3 Procedure for Claiming Prizes.

A. To claim a "TEXAS MLB" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $50.00 or $100 a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $50.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "TEXAS MLB" Instant Game prize of $1,000, $5,000 or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "TEXAS MLB" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "TEXAS MLB" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "TEXAS MLB" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 1056. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 1056 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	800,000	7.50
$10	460,000	13.04
$15	120,000	50.00
$20	80,000	75.00
$50	89,750	66.85
$100	17,250	347.83
$1,000	60	100,000.00
$5,000	15	400,000.00
$50,000	6	1,000,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.83. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1056 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1056, the State Lottery Act (Texas Government Code,

Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200800546
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: January 30, 2008

♦ ♦ ♦

Instant Game Number 1065 "Right on the Money"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1065 is "RIGHT ON THE MONEY". The play style is "key number match with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1065 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 1065.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, STAR SYMBOL, $5.00, $10.00, $15.00, $20.00, $25.00, $40.00, $50.00, $100, $500, $1,000, and $50,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1065 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
STAR SYMBOL	WINX10
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$20.00	TWENTY
$25.00	TWY FIV

$40.00	FORTY
$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$1,000	ONE THOU
$50,000	50 THOU

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 1065 - 1.2E

CODE	PRIZE
FIV	$5.00
TEN	$10.00
FTN	$15.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

G. Low-Tier Prize - A prize of $5.00, $10.00, $15.00 or $20.00.

H. Mid-Tier Prize - A prize of $50.00, $100 or $500.

I. High-Tier Prize - A prize of $1,000, $5,000 or $50,000.

J. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1065), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 1065-0000001-001.

L. Pack - A pack of "RIGHT ON THE MONEY" Instant Game tickets contains 075 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of 001 and front 075.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "RIGHT ON THE MONEY" Instant Game No. 1065 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "RIGHT ON THE MONEY" Instant Game is determined once the latex on the ticket is scratched off to expose 44 (forty-four) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to any of the WINNING NUMBERS play symbols, the player wins the PRIZE shown for that number. If a player reveals a STAR SYMBOL, the player wins 10 (ten) TIMES the PRIZE shown for that symbol. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 44 (forty-four) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 44 (forty-four) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 44 (forty-four) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 44 (forty-four) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. The "STAR" play symbol (10 times multiplier) will only appear once on intended winning tickets and only as dictated by the prize structure.

C. No more than three (3) identical non-winning prize symbols will appear on a ticket.

D. No duplicate WINNING NUMBERS play symbols on a ticket.

E. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

F. Non-winning prize symbols will never be the same as the winning prize symbol(s).

G. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 5 and $5).

H. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "RIGHT ON THE MONEY" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $50.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "RIGHT ON THE MONEY" Instant Game prize of $1,000, $5,000 or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "RIGHT ON THE MONEY" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp pro-

gram or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "RIGHT ON THE MONEY" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "RIGHT ON THE MONEY" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 7,080,000 tickets in the Instant Game No. 1065. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 1065 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	849,600	8.33
$10	708,000	10.00
$15	188,800	37.50
$20	141,600	50.00
$50	94,400	75.00
$100	11,623	609.14
$500	885	8,000.00
$1,000	177	40,000.00
$5,000	15	472,000.00
$50,000	10	708,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.55. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1065 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1065, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200800581
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: February 1, 2008

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Public Utility Commission of Texas

Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on January 31, 2008, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable San Antonio, L.P. to amend a State-Issued Certificate of Franchise Authority, Project Number 35297 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the municipality of Cibolo, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 35297.

TRD-200800703
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 5, 2008

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Notice of Application for Amendment to Certificated Service Area Boundary

Notice is given to the public of an application filed on January 31, 2008, with the Public Utility Commission of Texas for an amendment to a certificated service area boundary in Grimes County, Texas.

Docket Style and Number: Application of Consolidated Communications for a Minor Boundary Amendment to its Certificate of Convenience and Necessity between the Montgomery and Plantersville Exchanges. Docket Number 35296.

The Application: Consolidated Communications is requesting a minor boundary amendment to incorporate a small plot of undeveloped land that is contiguous to a developed portion of Consolidated's Montgomery exchange into the Montgomery exchange that is currently in United Telephone Company Texas d/b/a Embarq's Plantersville exchange. No customers are impacted by this change. Embarq has provided a letter of concurrence endorsing this proposed change.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas by February 22, 2008, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 35296.

TRD-200800701
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 5, 2008

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On January 31, 2008, Softswitch Communications, Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60446. Applicant intends to reflect a change in ownership/control.

The Application: Application of Softswitch Communications, Inc. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 35298.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than February 21, 2008. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 35298.

TRD-200800705
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 5, 2008

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On February 1, 2008, Sterling Telecom, Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60793. Applicant intends to reflect a change in type of provider to include facilities-based as well as resale services.

The Application: Application of Sterling Telecom, Inc. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 35301.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than February 21, 2008. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commis-

sion at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 35301.

TRD-200800706
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 5, 2008

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Notice of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas (commission) received an application on February 1, 2008, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Comcast of Houston, LLC for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 35302 before the Public Utility Commission of Texas.

The requested amended CFA service area includes all areas within the boundaries of the municipality of Manville, Texas, including any future annexations.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 35302.

TRD-200800707
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 5, 2008

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Notice of Application for Sale, Transfer, or Merger

Notice is given to the public of an application for sale, transfer, or merger filed with the Public Utility Commission of Texas on January 29, 2008, pursuant to the Public Utility Regulatory Act, Texas Utility Code Annotated §§14.001, 39.262, and 39.915 (Vernon 2007 and Supp. 2007) (PURA).

Docket Style and Number: Joint Application of Sharyland Utilities, LP (Sharyland) and Sharyland Distribution and Transmission Services, LP (SDTS) for Regulatory Approvals Pursuant to PURA §§14.101, 39.262, and 39.915, Docket Number 35287.

The Application: Sharyland Utilities, LP (Sharyland) is an investor-owned, Texas-based electric utility operating as a "wires only" company that has no interests or affiliations with retail electric providers or with electric generation in Texas. Sharyland's current transmission and distribution facilities include (1) distribution facilities used to serve its certificated retail service area between McAllen and Mission, Texas; (2) approximately 15 miles of 138-kV transmission line located in or near its service territory; and (3) an asynchronous interconnection between the Electric Reliability Council of Texas (ERCOT) and the Comisión Federal de Electricidad, the Mexican electrical grid.

Sharyland seeks to acquire or construct additional transmission and distribution facilities in ERCOT. So that this can be accomplished, Sharyland plans to restructure in a manner that will allow it broader alternatives for obtaining equity for significant capital expenditures. As part of the planned restructuring, Sharyland seeks regulatory approval to transfer the ownership interest in its transmission and distribution assets to Sharyland Distribution and Transmission Services, LP (SDTS), the new entity, which will in turn lease the facilities back to Sharyland. Sharyland will maintain a controlling general partnership interest in SDTS, will continue to hold the Certificate of Convenience and Necessity, will have sole responsibility for operating the electric system, and will continue to comply with all commission requirements. Sharyland stated that there will be no change in its currently-effective rates as a result of this transaction. Applicants request a commission finding that all aspects of its contemplated restructuring and transfer fall within the scope of the Public Utility Regulatory Act, Texas Utility Code Annotated §§14.101, 39.262, and 39.915 (Vernon 2007) (PURA) and are consistent with the public interest.

Sharyland stated that the central business purpose to support its restructuring is to enhance its ability to finance new investment in transmission and distribution facilities in ERCOT by allowing it to access previously untapped public capital markets while assuring that the current owners retain control of the regulated utility.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477. Hearing- and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All correspondence should refer to Docket Number 35287.

TRD-200800556
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: January 31, 2008

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on January 28, 2008, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Access Point, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 35285 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ADSL, ISDN, HDSL, SDSL, RADSL, VDSL, T1-Private Line, Switch 56 KBPS, Frame Relay, Fractional T1, and long distance services.

Applicant's requested SPCOA geographic area includes the entire State of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than February 20, 2008. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 35285.

TRD-200800555

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: January 31, 2008

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Notice of Application to Relinquish a Service Provider Certificate of Operating Authority

On January 28, 2008, Resource Innovations Group, Inc., d/b/a DFW-Direct, filed an application with the Public Utility Commission of Texas (commission) to relinquish its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60111. Applicant intends to relinquish its certificate.

The Application: Application of Resource Innovations Group, Inc. d/b/a DFW-Direct to Relinquish its Service Provider Certificate of Operating Authority, Docket Number 35282.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than February 21, 2008. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 35282.

TRD-200800554
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: January 31, 2008

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Texas Residential Construction Commission

Notice of Applications for Designation as a "Texas Star Builder"

The Texas Residential Construction Commission (commission) adopted rules regarding the procedures for designation as a "Texas Star Builder" at 10 TAC §303.300. The rules were adopted pursuant to §416.011, Property Code (Act effective September 1, 2003), which provides that the commission shall establish rules and procedures through which a builder can be designated as a "Texas Star Builder." The commission rules for application for designation can be found on the commission's website at www.trcc.state.tx.us.

10 TAC §303.300(i)(2) requires the commission to publish in the *Texas Register* notice of the application of each person seeking to become designated as a "Texas Star Builder" registered under 10 TAC Chapter 303. The commission will accept public comment on each application for 21 days after the date of publication of the notice. Information provided in response to this notice will be utilized in evaluating the applicants for approval. The Texas Star Builder designation requires that a builder or remodeler demonstrate that its education, experience and commitment to professionalism sets the builder or remodeler apart from its peers and offers some assurance to its customers that its quality of service and construction will be above average.

Pursuant to 10 TAC §303.300(i)(2) the commission hereby notices the application for designation as a "Texas Star Builder" of:

Jeffrey Erickson Construction LLC., 3520 Buddy Owens, McAllen, Texas 78504. Jeffrey Erickson Construction LLC holds Texas Residential Construction Commission's builder registration #17654. The applicant's registered agent is Jeffrey Erickson.

Interested persons may send written comments regarding this application to Susan K. Durso, General Counsel, Texas Residential Construction Commission, P.O. Box 13144, Austin, Texas 78711-3144. Comments regarding this application will be accepted for 21 days following the date of publication of this notice in the *Texas Register*. Thereafter, the comments will not be considered as timely filed.

TRD-200800697
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Filed: February 5, 2008

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San Antonio-Bexar County Metropolitan Planning Organization

Request for Proposals

The San Antonio-Bexar County Metropolitan Planning Organization (MPO) is seeking proposals from qualified firms for the conduct of the Bicycle and Pedestrian Data Collection project.

A copy of the Request for Proposals (RFP) may be requested by calling Jeanne Geiger, Deputy Director, at (210) 230-6904 or by downloading the RFP and attachments from the MPO's website at www.sametroplan.org. Anyone wishing to submit a proposal must do so by 12:00 p.m., Wednesday, March 12, 2008 at the MPO office to:

Jeanne Geiger

Deputy Director

San Antonio-Bexar County MPO

825 S. St. Mary's

San Antonio, Texas 78205

The Selection/Oversight committee will review the proposals based on the evaluation criteria listed in the RFP. The contract award will be made by the MPO's Transportation Policy Board based on the recommendation of the project's Selection/Oversight Committee.

Funding for this project, in the amount of $150,000, is contingent upon the availability of Federal transportation planning funds.

TRD-200800704
Jeanne Geiger
Deputy Director
San Antonio-Bexar County Metropolitan Planning Organization
Filed: February 5, 2008

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Sul Ross State University

Request for Proposals

Pursuant to Texas Government Code, Chapter 2254, Sul Ross State University, a member of the Texas State University System, announces the solicitation for consultant services to advise and assist with the management and administration of a U.S. Department of Education Grant.

Project Summary: Sul Ross State University is applying for a federally funded U.S. Department of Education grant. The university plans to utilize the two-year grant to increase the number of Hispanic and other low-income students attaining degrees by working with area high school students in the fields of science, technology, engineering and/or mathematics. The university will also work with regional community colleges to develop model transfer and articulation agreements in the same fields. The successful vendor will share in the responsibility for

assurance of the attainment of the grant objectives, compliance with the terms and conditions of the grant and will provide services such as assistance in budget management, consultations, performance reporting, and review and editing of reports. Similar services have previously been provided by a consultant. Sul Ross State University intends to award the contract for the consulting services to a previously used consultant unless a better offer is received.

In accordance with the provisions of Government Code §2254.028(c), the president of Sul Ross State University has approved the use of a private consultant and has determined that the required fact exists.

Proposals are to be received no later than 4:30 p.m., Monday, March 17, 2008. A copy of the request for proposal packet is available upon request from Noe Hernandez, Senior Buyer, Sul Ross State University, P.O. Box C-116, Alpine, Texas 79832, phone (432) 837-8045, fax (432) 837-8046.

Vendors will be evaluated on credentials for the work to be done, previous successful experience on similar grant projects and interpersonal and written communication skills. Proposals will be evaluated on the fulfillment of the requirements as outlined in the specifications, a fee schedule which is appropriate to the proposed activities, and the quality of performance on previous contracts or experience on similar projects.

The University reserves the right to reject any and all proposals received if it is determined to be in the best interest of the University. All material submitted in response to this request becomes the property of the University and may be reviewed by other vendors after the official review of the proposals.

TRD-200800623
Noe Hernandez
Senior Buyer
Sul Ross State University
Filed: February 1, 2008

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Texas Department of Transportation

Request for Proposal - Private Consultant Services

The Texas Department of Transportation (department) announces a Request for Proposal (RFP) for private consultant services pursuant to Government Code, Chapter 2254, Subchapter B. The term of the contract will be from project initiation to 6 months later. The Public Transportation Division (division) of the department will administer the contract. The RFP will be released on February 15, 2008 and is contingent upon the finding of fact from the Governor's Office.

Purpose: The intent of the division and this Request for Proposal is to procure the professional services of a consultant to conduct an on-site safety and security review of the Metropolitan Transit Authority of Harris County (METRORail), the Dallas Area Rapid Transit (DART), and the Galveston Island Trolley (GIT) rail fixed guideway systems in accordance with the Federal Transit Administration 49 CFR Part 659.29 and the department's System Safety and Security Program Standard. The department will award and issue a separate contract for each safety and security review. At the conclusion of the on-site review, the consultant must prepare and issue a report containing findings and recommendations resulting from that review which includes an analysis of the effectiveness of the System Safety Program Plan and the System Security Plan and a determination of whether either should be updated. The consultant must work with METRORail, DART, and GIT to resolve all outstanding issues resulting from the review within 90 working days of the conclusion of the on-site review.

Eligible Applicants: Eligible applicants include, but are not limited to, organizations that provide private consulting services.

Program Goal: Ensuring the department's state safety and security oversight program is fully implemented and meets the requirements of the federal rail safety and security program.

Review and Award Criteria: Each application will first be screened for completeness and timeliness. Proposals that are deemed incomplete or arrive after the deadline will not be reviewed. A team of reviewers from the division will evaluate the proposals as to the private consultant's competence, knowledge, and qualifications and as to the reasonableness of the proposed fee for the services. The criteria and review process are further described in the RFP.

Deadlines: The department must receive proposals prepared according to instructions in the RFP package on or before March 28, 2008, 3:00 p.m.

To Obtain a Copy of the RFP: Requests for a copy of the RFP should be submitted to Susan Hausmann, Texas Department of Transportation, Public Transportation Division, 125 East 11th Street, Austin, Texas 78701-2483. Telephone (512) 416-2833.

Copies will also be available on the department's Public Transportation Division web page at **http://www.dot.state.tx.us/services/public_transportation/default.htm**.

TRD-200800668
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: February 4, 2008

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Texas Water Development Board

Request for Application for Planning

The Texas Water Development Board (TWDB) requests, pursuant to 31 Texas Administrative Code (TAC) §355.92, the submission of regional water planning applications leading to the possible award of contracts to revise or update regional water plans as described in 31 TAC Chapter 357. In order to receive a grant, the applicant must be a political subdivision of the state and must have been designated an eligible applicant by a regional water planning group as defined in 31 TAC §355.91. 31 TAC Chapter 355, Subchapter C provides guidance for regional water planning grants.

Description of Funding Consideration.

Total funding for activities related to the development or revision of a regional water plan shall not exceed 100 percent of the total cost of the planning for that regional water planning area as defined in 31 TAC §355.91. Funds awarded for grants under this request for applications may total up to the amount of funds appropriated for such activities for the Fiscal Year 2008-2009 biennium and anticipated for the Fiscal Year 2010-2011 biennium. This planning will conclude the five year planning cycle of Fiscal Year 2007 through 2010.

Funding is provided for certain planning tasks as outlined in the Guidance for Preparation of Scope of Work for Phase II of the Third Round of Regional Water Planning. As further outlined in the Scope of Work Guidance, provisions exist for additional funding for tasks related to projections, water supply analysis, water management strategy evaluations, and the strategies' impact on water quality. In the event that acceptable applications are not submitted or that insufficient funds are available to fund proposed activities beyond the regional water plan-

ning tasks identified by the regional water planning group, the TWDB retains the right to not award contract funds.

Deadline, Review Criteria, and Contact Person for Additional Information.

Five double sided copies and an electronic version of a complete regional water planning grant application must be filed with the Board prior to 5:00 p.m., June 13, 2008. All applications should be prepared using the TWDB's application instruction sheet for Regional Water Planning Grants, the Guidance for Preparation of the Scope of Work for Phase II of the Third Round of Regional Water Planning, and the Guidelines for Regional Water Plan Development in Exhibit B of the Regional Water Planning Contracts. Applications will be evaluated according to the criteria listed in 31 TAC §355.94. All potential applicants may contact the Board to obtain the application checklist and guidance documents or they may be obtained from the Texas Water Development Board's webpage at: http://www.twdb.state.tx.us/rwpg/planning_page.asp

Applications must be directed either in person to David Carter, Texas Water Development Board, Stephen F. Austin Building, 1700 North Congress Avenue, Austin, Texas, or by mail to David Carter, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231. Requests for information, the Board's rules, and instruction sheet covering the research and planning fund may be directed to Kathleen Ligon at the preceding address or by calling (512) 463-8294, or by e-mail at kathleen.ligon@TWDB.state.tx.us

TRD-200800727
Ingrid K. Hansen
Acting General Counsel
Texas Water Development Board
Filed: February 6, 2008

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Workforce Solutions North Texas

Workforce Investment Act

Workforce Solutions North Texas and the Texas Workforce Commission are seeking training provider applicants for possible placement on the statewide list of approved training facilities in support of the Workforce Investment Act (WIA).

WIA conducts Federal job training programs with a comprehensive workforce investment system to help Americans access tools they need to manage their careers through information and high quality services, and to help U.S. companies find skilled workers.

Workforce Solutions North Texas is the administrative entity for WIA programs within the North Texas Workforce delivery area, including: Archer, Baylor, Clay, Cottle, Foard, Hardeman, Jack, Montague, Wichita, Wilbarger, and Young counties.

Eligible training providers are: post-secondary educational institutions, entities that carry out programs under the National Apprenticeship Act and, other public or private providers of a program of training services.

Obtain additional information by contacting Joe Winkcompleck at Workforce Solutions North Texas, 901 Indiana Ave. Ste. 180, Wichita Falls, TX 76301, (940) 767-1432, FAX (940) 322-2683. or email at joe.winkcompleck@twc.state.tx.us.

TRD-200800692
Joe Winkcompleck
Administrative Technician
Workforce Solutions North Texas
Filed: February 5, 2008

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How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affecte***d. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).